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IN THE

Supreme Court of the United States

JAMES J. BELHUMEUR, *et al.*,

Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION;
SPRINGFIELD EDUCATION ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

Whenever employees are compelled to pay union fees, this Court requires procedures by which they can challenge the fee amount. When this "challenge" remedy was first devised as a method to protect employees from coerced political speech, Justice Black dissented, predicting that such challenge procedures would place an undue burden on employee Free Speech rights.

1. Does a challenge procedure, which takes eight (8) years to provide the "reasonably prompt" determination required by *Chicago Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986), place an undue burden on employee Free Speech rights?

2. Does a challenge procedure unduly burden employee Free Speech rights when it: a) charges them for 100% of certain union overhead expenses even though only 50% of the underlying activities are chargeable; b) charges them for 100% of union meetings where nonchargeable political and chargeable collective bargaining activities are commingled, and the union is unable to establish the proper proportion of each; c) shifts the burden of proof to the challengers; and, d) requires challengers to pay over $25,000 to obtain a transcript without which these issues could not be properly argued or preserved for judicial review?

3. Do all challenge procedures, as Justice Black predicted in *IAM v. Street*, 367 U.S. 740 (1961), contain such high transaction costs that they of necessity unduly burden Free Speech rights?

PARTIES TO THE PROCEEDINGS BELOW

The petitioners not listed on the cover are: Helene Adams, Jean Pierre Anselme, Peter Anthony, Clyde Armstrong, Sharon Barnett, Elizabeth J. Beauregard, Raymond J. Beauregard, Anne J. Bovat, Ben Branch, Marguerite Burchell, Mary Burger, Michael Burns, Patricia Burns, Carolyn T. Canavosio, Albert J. Carlin, Nancy Carlson, Richard Carrerio, Vere Chappell, Charles Cipollini, Paul T. Coffill, Joseph H. Connolly, Kenneth E. Cook, Jr., Susan J. Danton, Elvira Darmiento, Robert Davis, John F. Dowd, Brian J. Downey, David Dupuis, Eleanor Dupuis, John P. Ebersole, David E. Elworthy, Reza Fazel, Dennis A. Fenton, Barbara W. Finkel, Lawrence Finnerty, Jean Flint, Deborah Flynn, Clive Foss, Barbara A. Freeman, Hugo Galli, Diane T. Galluccio, Ronald Galluccio, Gerald R. Garrett, Anne Garvey, Deborah K.T. Gendreau, Francis Guiliano, Waldo Goodermote, Estelle A. Gross, Joseph Gustafson, Joseph E. Hagan, Leslie A. Hansen, Marial Harper, Sylvia Hebert, Richard Herbst, Jean Jonker, Elizabeth H. Karr, Frank Katch, Paul F. Kelley, Angela Kennedy, Barbara Kirby, Richard Kofler, Michael Kreisler, Nelson J. Lacey, Francis LaPorte, Stephen LeClair, Patricia LeMay, Cynthia Leal, Ann Luchini, Edward Lundrigan, Laura MacPhaul, Harold P. Mahon, John W. Mandell, Ellen Manolakis, Martin Manoogian, Norma L. Markey, John F. Marzilli, Maria Mazzaferro, Jose Mestre, Sheila Miano, Benjamin Mollow, Loretta Morelle, Siamak Movahedi, Richard J. Mulhern, William A. Nash, Patrick Nerbonne, Gerard O'Brien, Ellen R. O'Neil, Jeanne Pallatroni, John D. Palmer, Arthur J. Papandrea, Abel Pimental, Francis Porcaro, David Pozar, Richard Ricciardi, Edwina Rissland, Nancy Roberts, George Russell, James Ryan, Kathryn Sanders, William E.

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The respondents not listed on the cover are: National Education Association, Massachusetts Teachers Association, Andover Education Association, Arlington Education Association, Bridgewater Education Association, Chicopee Education Association, Fairhaven Education Association, Faculty–Staff Union, Holyoke Education Association, Massachusetts Society of Professors, New Bedford Education Association, Quabbin Education Association, Tantasqua Education Association, Wareham Education Association, Woburn Education Association, and Education Association of Worcester.

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PETITION FOR WRIT OF *CERTIORARI*

Petitioners James J. Belhumeur, *et al.*, respectfully request that a writ of *certiorari* issue to review the judgment of the Supreme Judicial Court of Massachusetts, in *Belhumeur v. Labor Relations Commission,* 432 Mass. 458, 735 N.E.2d 860 (2000).

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported at 432 Mass. 458 and 735 N.E.2d 860 (2000). The opinion is reproduced in Appendix ("App.") A to this Petition at 1a. The opinion and order of the Massachusetts Labor Relations Commission is reported at 23 MLC 233 (1996) and is reproduced in Appendix B at 25a. The Recommended Findings of Fact and Recommended Conclusions of Law of the Hearing Officer are unreported and are reproduced in Appendix C at 100a.

JURISDICTION

The Supreme Judicial Court of Massachusetts entered its judgment and order on September 21, 2000. This petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution. This case also involves Massachusetts General Laws chapter 150E, § 12. Their pertinent text is set out in Appendices D and E at pages 306a and 307a.

STATEMENT OF THE CASE

I. Factual Background.

James Belhumeur and his fellow teachers ("teachers") are required to join the Massachusetts Teachers Association ("MTA" or "union") and its affiliates or pay to them a nonmember agency fee as a condition of employment. This is the result of a contract between their employer and the local union affiliated with the MTA.

Over the five-year period at issue here, the MTA's agency fee demand ranged from 97.9% to 74.5% of dues.

Year	MTA Dues	MTA Agency Fee	%
1987-88	$178.00	$157.57	88.5%
1988-89	$191.00	$186.95	97.9%
1989-90	$203.00	$196.36	96.7%
1990-91	$217.00	$207.10	95.4%
1991-92	$229.00	$170.70	74.5%

The teachers believed these fee demands were excessive, thereby violating their Free Speech rights. In Massachusetts, the Supreme Judicial Court directs agency fee objectors to initially file agency fee challenges with the Labor Relations Commission ("Commission"). *School Comm. of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70 (1982).

As a result, beginning on July 27, 1989, Mr. Belhumeur and 118 other teachers filed 429 challenges over a five-year period objecting to the amount of the agency fee. All of these challenges specifically contended the teachers' First Amendment rights were being violated by the union's excessive charges.

On July 11, 1990, approximately one year after the initial challenge was filed, the Commission issued its first complaint against the union, alleging that the agency fee demand was excessive. As more challenges piled up unresolved before the Commission, on July 15, 1992, the teachers sought to streamline the resolution of five years of agency fee challenges. They entered into a partial

settlement agreement designed to make the MTA's actual expenses for the 1990-91 year (which formed the basis for its 1991-92 demand) the focus of a trial to determine the agency fee percentage for all five years.

The hearing on the proper amount of the MTA fee began on February 8, 1993, before a Hearing Officer designated by the Commission. By the second day of trial, the evidence revealed the MTA was directing and financing its primary political campaign through its "collective bargaining" division (Affiliate Services), a division which the union previously claimed in its agency fee demand contained no political expenses whatsoever. This led the teachers to make a Motion for Judgment, which was denied. Thereafter, the trial ground on for 53 days spanning the next 23 months, and concluded on December 14, 1994. (App. 27a)

On March 21, 1996, the Hearing Officer issued a 240-page recommended finding that the MTA violated the law by demanding an excessive agency fee. (App. 100a)

A little more than a year later, on April 23, 1997, the Commission acted on the recommendations of the Hearing Officer. (App. 25a) With few exceptions, it accepted the recommendations and found that the agency fee demand was illegally excessive. The Commission found that an agency fee of 66.3% of dues was appropriate based on the evidence.

Both the teachers (who thought the agency fee was still excessive) and the union filed timely notices of appeal. More than two years later, on August 17, 1999, the Commission assembled the record and the case was

entered on the docket of the Appeals Court. The Massachusetts Supreme Judicial Court granted direct review, bypassing the Appeals Court, and handed down its decision on September 21, 2000. (App. 1a)

The teachers were before the Commission from July 27, 1989 until August 17, 1999, eight (8) years of which were devoted to reaching a Commission decision. All this time the teachers' money was (and still is) tied up in a Commission-mandated escrow account.

In its decision, the Commission opined that it was providing the prompt preliminary hearing required by *Chicago Teachers Local 1 v. Hudson,* 475 U.S. 292, 307 (1986). As a result, it determined that it need not "adhere to judicial rules of evidence and procedure" (App. 28a-29a) and should, instead, "harmonize" the usual requirement of "an adequate evidentiary basis" with the *Hudson* requirement of a "reasonably prompt decision" (App. 37a), with the result that "reasonable estimates" and "fair approximations" would be appropriate. (App. 53a, n.15)

This evidentiary approach resulted in the Commission accepting as adequate the union's proof of its *political* activities, *i.e.,* proving what the nonmembers did not owe the union. The Commission described its findings as follows:

> After the MTA met its *prima facie* burden, the [nonmembers] met their production burden by calling into question aspects of the Union's *prima facie* case. The [nonmembers] challenged the reliability of the MTA's time keeping system and provided examples of activity the MTA considered

> chargeable to nonmembers that the [nonmembers] argued the MTA spent on political events. In response, the MTA's witnesses acknowledged documentary evidence that it had misallocated some time to the incorrect account.[11] (App. 38a-39a)

In footnote 11 the Commission continued:

> For example, the MTA offered detailed charts accompanying Janet Strecker's affidavits correcting this allocation of nonchargeable activities within the Affiliate Service Division. (App. 39a)

The Commission later concluded:

> We find that, on this record, the MTA met its burden of persuasion that its *political time and activities can be isolated and segregated.* We are persuaded that Strecker's testimony, including the charts contained in her affidavit, contained a reasonable, good faith ledger of the Affiliate Service staffs' *primary political activities.* (App. 46a-47a) (emphasis added)

The Commission thus allowed the union to satisfy its burden of proving the chargeable amount solely with negative evidence concerning the extent of its political activities.

The Commission also determined that if a union meeting involved a mixture of chargeable and political time, the *entire* meeting could be charged to the teachers. The Commission described its approach this way:

> We reject the notion, implicit in the listing of events in Appendix D, that any gathering at which a nonchargeable topic is referenced becomes a fully nonchargeable event. (App. 48a)

Instead, the Commission accepted the notion that, notwithstanding their clear political content, these union meetings were *fully* chargeable events.

An example of a fully chargeable meeting follows. The agenda of the Tuesday, November 13, 1990 "Management Meeting" reads:

1. Question Three [A statewide tax referendum.]
2. State budget
    a) Shortfall
    b) Tax cuts
    c) 2½ changes
3. Political organizing at local level
4. Membership
5. MATA agreement
6. Personnel updates
7. Financing political action
8. Brief updates on division activities
9. Other

Similar management meetings reflecting substantial political work were likewise treated as 100% chargeable.

Another example illustrates the inconsistent and arbitrary nature of the Commission's approach. The union held a meeting which was expensed under the category "Assist locals in extraordinary collective bargaining situations." Although the union claimed this was a chargeable collective bargaining expense, the teachers showed that this program contained expenses for flying representatives from other state teacher unions cross country to tell the union's paid employees about their personal experience in conducting statewide strikes in their home states.

While the Commission found the specific travel expenses of the speakers to be nonchargeable, it charged the teachers for the union staff time and expenses of those who listened to the political presentation. Why? Because other, non-political matters were discussed and "there was no indication" the political matters caused additional expenses. (App. 52a)

Yet another example involved the "overhead" divisions of the MTA. The Commission treated certain overhead divisions, such as accounting, as 100% chargeable to the teachers, notwithstanding the Commission's findings that only half (52.4%) of the MTA's non-overhead expenses were chargeable. (Compare App. 81a with App. 84a-85a)

Indeed, the Commission treated MTA's accounting division as 100% chargeable, even while finding that it spent time working on political campaign reporting and recordkeeping for the MTA's political action committee. (App. 81a) Although the Supreme Judicial Court modified the Commission's decision by ordering it to subtract from chargeable expenses the specific political hours proven by the teachers to have been expended in the accounting

division, it allowed everything else to be charged to them. (App. 15a-16a)

Finally, a hearing of this magnitude (53 days) necessarily called for a written transcript to allow proper argument and judicial review. The Commission not only rebuffed the teachers' request to use the least expensive, competent court reporter (Commission Docket number ("Docket") 81a), but left the teachers with a $25,000 court reporting bill. (Docket 110)

II. The Federal Question.

In *Abood v. Detroit Board of Education,* 431 U.S. 209, 234 (1977), this Court ruled that public employees compelled to pay union fees have a Free Speech right to refuse to support the political and ideological positions of unions. At the same time, this Court acknowledged the difficulty in drawing the line between chargeable and nonchargeable union expenditures. *Id.* at 236.

Last term this Court again admitted the difficulty in "defin[ing] germane speech [expenses chargeable to objectors] with ease or precision" in this type of case. *Board of Regents v. Southworth*, 529 U.S. 217, __, 120 S. Ct. 1346, 1355 (2000).

It is critical that this difficult task be properly and carefully performed, for it draws the contours of the teachers' First Amendment rights of free speech and association. *See, generally, Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507 (1991); *Riley v. National Fed'n of the Blind,* 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the

content of the speech. We therefore consider the Act as a content-based regulation of speech.").

As a result of the fundamental rights at stake, this Court determined that "carefully tailored" procedural safeguards must be followed to "minimize the infringement" on First Amendment rights. *Hudson,* 475 U.S. at 303, 307.

One of these procedural safeguards is a "reasonably prompt decision" on the amount of the agency fee by an impartial decision-maker. *Id.* at 307. *See, Air Line Pilots Ass'n v. Miller,* 523 U.S. 866, 876 n.4 (1998).

In Massachusetts, this initial decision-maker is the Labor Relations Commission. *School Comm. of Greenfield,* 385 Mass. at 76, 85. Not only did the Supreme Judicial Court assign this obligation years ago, the Labor Commission confirmed in this specific case that it was providing the teachers with their *Hudson* hearing (App. 29a) and the Supreme Judicial Court agreed the hearing at issue was the *Hudson* hearing. (App. 6a, 8a-9a)

The Hearing Officer, the Labor Relations Commission and the Supreme Judicial Court analyzed this case in light of the foregoing First Amendment principles because the objecting teachers raised their federal constitutional rights from the onset of this litigation. The first document filed with the Labor Commission, the Prohibited Practice charge, stated in part: "These [agency fee] demands violate ... [the] federal constitutional rights of the charging party." (Docket 39)

The teachers' brief to the Hearing Officer (Docket 93, Charging Parties Brief on the Merits), on pages 38-52

(Vol.1) and pages 192-96 (Vol.3), specifically argued the agency fee procedures were unconstitutional as applied. This argument also was made to the Commission, in the teachers' challenges to the proposed findings of fact and conclusions of law of the Hearing Officer. (Docket 102, Charging Parties' Challenges, pp. 13, 31-39, 345-49)[1]

The teachers devoted their entire brief to the Supreme Judicial Court to their claims that the decision and the procedures used by the Labor Relations Commission to arrive at the chargeable versus nonchargeable calculation violated their First Amendment rights. (Charging Parties-Appellants' Brief, pp. 18-59.) Their conclusion (p. 58) stated, "For these reasons, this Court should declare the current agency fee procedure an unconstitutional burden ...."

The Supreme Judicial Court, based on the First Amendment, ruled on the teachers' objection to the delay in the *Hudson* hearing. It concluded that, despite the eight (8)-year adjudication, the Commission provided "a reasonably prompt decision." (App. 8a) It held that charging the teachers for 100% of mixed (political and nonpolitical) meetings and a "presumption" of

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[1] The teachers raised the issue of the burdensome nature of the transcript costs informally at the prehearing conference, and they filed a formal motion (Docket 81a, Motion To Limit The Undue Financial Burden Placed On Charging Parties In Challenging The Agency Fee Amount) on April 7, 1993, just after the trial started. On May 2, 1997, the teachers also filed a post-hearing motion for an award of $26,866.71 in transcription costs. (Docket 110)

chargeability for certain mixed meetings was consistent with the First Amendment. (App. 10a-16a & 13a n.12)

REASONS FOR GRANTING THE WRIT

I. The Massachusetts Procedure Reveals the Time Has Come to Re-evaluate the Burden on Employee First Amendment Rights Created by the *Street* Experiment.

This Court recently recognized the constitutional right of individuals to be "left alone" and not be forced to support what someone else thinks is an excellent idea. *Hill v. Colorado,* 530 U.S. __, __, 120 S. Ct. 2480, 2489 (2000) ("right to be let alone ... characterized as the most comprehensive of rights and the right most valued by civilized men"); *Boy Scouts of America v. Dale,* 530 U.S. __, __, 120 S. Ct. 2446, 2451(2000) (right to express your own views "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas"); *California Democratic Party v. Jones,* 530 U.S. __, 120 S. Ct. 2402 (2000) (right of party to select own political candidate without outside interference).

The teachers here want to be able to teach their students without being forced into a decade long, expensive battle with the union. They wish to be left to their own political views, instead of being compelled to support the union's political preferences.

This Court's precedents leave no doubt that the Massachusetts compulsory union fee statute, G.L. c. 150E, § 12, compels the nonmember's speech. *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507 (1991); *Abood v. Detroit Bd.*

of Educ., 431 U.S. 209 (1977); *see, Riley v. National Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988).

Drawing the line between chargeable and non-chargeable union expenses therefore draws the line between what union speech nonmembers can be required to support and what speech they cannot be required to support. "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

> Error in marking that line exacts an extraordinary cost. It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.

United States v. Playboy, 529 U.S. 803, __, 120 S. Ct. 1878, 1888 (2000).

Massachusetts' scheme for drawing the line of compelled speech is inordinately burdensome. A vast gulf exists between the Court's pronouncements that the line must be carefully and finely drawn to limit the burden on nonmembers' free speech rights, versus the reality of what has occurred in this case.

This problem was accurately predicted by a member of this Court. When the Court, in *IAM v. Street*, 367 U.S. 740 (1961), first consigned individual political objectors

to protracted litigation involving accounting battles against organized labor to protect their Free Speech rights, the Court majority predicted these disputes could be resolved with "a minimum of administrative difficulty." *Id.* at 774 (footnote omitted).

While Justice Douglas had some reservations about that prediction, *id.* at 778, Justice Black believed the majority was patently wrong, and presciently predicted that the process would work a monumental infringement on the rights of objectors. Black wrote:

> It may be that courts and lawyers with sufficient skill in accounting, algebra, geometry, trigonometry and calculus will be able to extract the proper microscopic answer from the voluminous and complex accounting records of the local, national and international unions involved. It seems to me, however, that while the Court's remedy may prove very lucrative to special masters, accountants and lawyers, this formula, with its attendant trial burdens, promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated ....
>
> I cannot agree to treat so lightly the value of a man's constitutional right to be wholly free from any sort of governmental compulsion in the expression of opinions. It should not be forgotten that many men have left their native lands, languished in prison, and even lost their lives, rather

> than give support to ideas they were conscientiously against.

Id. at 795-96 (Black, dissenting)

Later, in 1977, when this Court added public servants to the growing list of employees whose Free Speech rights could be compromised by compelled union payments, it began to recognize, like Justice Black, that there existed "difficult problems in drawing lines between [chargeable and nonchargeable expenses]." *Abood*, 431 U.S. at 236.

When, thirty years after *Street*, and more than a decade after *Abood*, this Court actually heard a line-drawing case for teachers, the Court was hard-pressed to agree on how the First Amendment line on nonmembers' speech should be drawn. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

Most recently, this Court decided that the difficulties were so great in drawing the line on Free Speech rights that it would not impose the *Street* procedure on students and universities! *Board of Regents v. Southworth*, 529 U.S. 217, __ , 120 S. Ct. 1346, 1355 (2000) ("different members of the Court reached varying conclusions [in *Lehnert*] regarding what expressive activity was or was not germane to the mission of the association.... [I]t is difficult to define germane speech with ease or precision where a union or bar association is the party ....").

Experience now shows Justice Black was right! Forty years into the *Street* experiment and twenty years into the

Massachusetts agency fee procedure,[2] this Court should reconsider the transaction costs that Massachusetts in particular, and the *Street* approach to compulsory union fees in general, imposes on employees who object to being compelled to support organized labor's political point of view.

The Seventh Circuit in *Tavernor v. Illinois Federation of Teachers*, 226 F.3d 842, 850 (2000) recently focused on the "transaction costs" or "social costs" imposed on employees who, as here, are faced with burdensome agency fee challenge procedures. When *Tavernor* sounded the alarm about excessive transaction costs in agency fee challenges, it was simply reflecting this Court's long-standing position that imposing financial burdens on certain speech violates Free Speech rights because it tends to drive certain speakers from the marketplace of ideas. *Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

Here, the record reveals a burdensome, lengthy, repetitive annual objection procedure which discourages objections and encourages conformity among those teachers who oppose being forced to support the union's political and ideological messages. Justice Douglas, in *Railway Employes' Department v. Hanson*, 351 U.S. 225, 238 (1956), opined that this Court's theoretical approval of compulsory union fees would not prejudice possible future disapproval of compulsory fees if a record came before the Court showing the procedure "is used as a cover

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[2] *School Comm. of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70 (1982).

for forcing ideological conformity or other action in contravention of the First Amendment."

This is exactly that case. This case not only has the record to show the excessive burdens of Massachusetts' agency fee procedure, it also shows unequivocally that the *Street* experiment cannot continue consistent with employee First Amendment rights. The specifics of these burdens, and how the Massachusetts' decision conflicts with federal decisions, is discussed next.

II. The Agency Fee Procedures Approved by the Massachusetts Supreme Judicial Court Impose Excessive Burdens upon the First Amendment Rights of Employees in Conflict with Decisions of This Court and Those of the First, Sixth, Seventh and Ninth Circuits.

A. The Conflict Concerning Undue Burden.

Tavernor, 226 F.3d at 850, said this about transaction costs in agency fee challenges:

> The Supreme Court has not asked for the impossible–it has not demanded that unions find a way to reduce transaction costs to zero–but it has sent the message that unions must use systems that will keep these costs to a manageable level.

Both the Ninth Circuit in *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370, 1375, *cert. denied*, 510 U.S. 964 (1993) ("Requiring agency fee payers to go through the inconvenience, embarrassment and delay of recovering even a small sum ... is a burden they cannot be required to bear, unless ... the procedure itself is reasonable ....") and the Fifth Circuit in *Shea v.*

IAM, 154 F.3d 508, 515 (1998) (annual objection requirement for nonmembers found unduly cumbersome) recognize that the burdens placed on nonmembers in agency fee challenges must be kept to a minimum, or the agency fee collection system fails.

This is consistent with the Court's instruction in *Hudson* that agency fee procedures must minimize the burden on nonmembers. 475 U.S. at 309.

1. The Burden of a Lengthy Adjudication.

The *Hudson* hearing which the Supreme Judicial Court approved as being "reasonably prompt" took *eight (8) years* from start to finish (and an added two (2) years to assemble the record for court review). Viewing an eight (8)-year procedure as prompt conflicts sharply with decisions of several circuits. The Seventh Circuit held that a delay of over one (1) year is an unconstitutional burden. *Tavernor*, 226 F.3d at 849 ("[Teachers are] deprived of those funds for well over a year. This system places a significant burden on the objection process.").

Previously, the Seventh Circuit held that an adjudication of eighteen months was unconstitutionally long. *Perry v. Local 2569, IAM*, 708 F.2d 1258, 1262 (1983).

The Sixth Circuit described procedures taking less than two years as "cumbersome, excessively protracted, and calculated to discourage meaningful objections to union activity. As such, they certainly could not be characterized as expeditious within the teachings of *Hudson*." *Damiano v. Matish*, 830 F.2d 1363, 1372 (1987) (footnote & citations omitted).

The Ninth Circuit has described a period of less than one year to be acceptably prompt. *Grunwald,* 994 F.2d at 1372.

Lower federal courts have found that a delay of over one year in reaching a *Hudson* decision is unconstitutional. *Lehnert v. Ferris Faculty Ass'n,* 643 F. Supp. 1306, 1332-33 (W.D. Mich. 1986), *aff'd,* 881 F.2d 1388 (6th Cir. 1989), *aff'd in part, rev'd in part,* 500 U.S. 507 (1991) (any decision that is not handed down before the end of the relevant fiscal year or soon thereafter is not "reasonably prompt"); *McGlumphy v. Fraternal Order of Police,* 633 F. Supp. 1074, 1083 (N.D. Ohio 1986) (Where "an objection could conceivably lay unresolved for 12 months," a union's fair share "procedure results in an unnecessary, and unconstitutional, delay in the resolution of objections."). One lower court called an eleven-month delay "maddening nonfeasance" on the part of the union. *Masiello v. U.S. Airways,* 113 F. Supp. 2d 870, 878 (W.D.N.C. 2000). On the other hand, another state supreme court determined that a delay of thirteen months is acceptable. *Kuehn v. AFSCME Council 65,* 435 N.W.2d 130, 131-32, 135 (Minn. Ct. App.), *cert. denied,* 493 U.S. 849 (1989).

When the Massachusetts Supreme Judicial Court addressed the conflicting decisions from the federal circuits, it simply said the fact that other courts had held "much shorter delays are unconstitutional [does not] mandate a conclusion that this proceeding was unconstitutional." (App. 9a, n.8)

Within the first two days of the agency fee hearing, it became clear that the union had not carefully calculated its agency fee demand. The undisputed evidence revealed

that the union had directed its employees to record all their political time and expenses to a program claimed in the agency fee demand to be 100% chargeable to agency fee payers. Although the objecting teachers asked, in light of this evidence, that their Motion for Judgment be granted and the fee declared illegal, the Commission allowed the hearing to continue for an additional 51 days spread over 2 years. (Docket 72, *see* App. 30a *ff.*)

If the Supreme Judicial Court is correct that an eight (8)-year adjudication is reasonable under Massachusetts' procedure, then that procedure is unconstitutionally burdensome to objecting teachers. *Tavernor*, 226 F.3d at 849.

An extraordinarily long adjudication is just one aspect of the burden imposed upon nonmember objectors by the Massachusetts system. The Supreme Judicial Court accepted several agency fee procedures, which are part of the state sanctioned system, which fairly can be said to maximize the burden on the teachers' First Amendment rights. A few examples from this litigation follow.

2. The Burden in Commingled Expenses.

The hearing revealed the union commingled nonchargeable political expenses with chargeable expenses and could not in many instances separate them. The teachers were nevertheless charged for 100% of the commingled expenses. Indeed, the Supreme Judicial Court approved the "presumption" that some commingled costs are chargeable. (App. 13a, n.12) Drawing the Free Speech line in such a way that it violates the teachers' speech rights, as opposed to the commingling union's

contractual rights, not only defies common sense, it conflicts with the First Circuit's position on this issue.

In *Schneider v. Colegio de Abogados*, 917 F.2d 620, 633-34 (1st Cir. 1990), *cert. denied*, 502 U.S. 1029 (1992), the court determined that where the bar association was unable to adequately separate out intertwined (chargeable and nonchargeable) expenses, the entire category of expenses was automatically invalidated.

Here, the union spent 50% of its basic ("non-overhead") expenses on nonchargeable activities. Despite this, the Labor Commission and the Supreme Judicial Court determined it was appropriate to charge nonmembers 100% of the union's accounting ("overhead") expenses.[3] This is in conflict with the treatment of overhead expenses by other courts. *Fell v. Independent Ass'n of Continental Pilots*, 26 F. Supp. 2d 1272, 1280 (D. Colo. 1998) ("In general, overhead costs should be allocated in proportion to their relation to nongermane expenses ...."); *Lehnert*, 643 F. Supp. at 1312; *see Southworth v. Grebe*, 1996 U.S. Dist. Lexis 20980 at *34 (W.D. Wis. 1996) ("by subsidizing overhead expenses of a political or ideological organization the university subsidizes the entire effort of the particular student group"), *aff'd in part, rev'd in part, vacated in part*, 151 F.3d 717 (7th Cir. 1998), *rev'd on other grounds sub nom. Board of Regents v. Southworth*, 529 U.S. 217 (2000); *Beck v. Communications Workers,*

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[3] The Supreme Judicial Court modified the Commission's holding by determining where the teachers were able to prove specific accounting time spent on politics, only those hours should be deducted. (App. 16a)

776 F.2d 1187 (4th Cir. 1985), *aff'd en banc*, 800 F.2d 1280 (1986), *aff'd*, 487 U.S. 735 (1988).

The Supreme Judicial Court determined that because the accounting division was "necessary" for the existence of the union (App. 16a), the teachers could be charged for all of its expenses, despite the fact that 50% of the underlying union expenses overseen by the accounting division were not chargeable. This conflicts with *Ellis v. Railway Clerks*, 466 U.S. 435, 450-51 (1984), which ruled that although a union newspaper was necessary, it was not 100% chargeable.

3. The Burden in the Evidentiary Approach.

The Massachusetts Labor Commission further unduly burdened the teachers' First Amendment rights by shifting the burden of proof to the teachers. The Commission described its decision-making this way:

> After the MTA met its *prima facie* burden, the Charging Parties met their production burden by calling into question aspects of the Union's *prima facie* case. The Charging Parties challenged the reliability of the MTA's time keeping system and provided examples of activity the MTA considered chargeable to nonmembers that the Charging Parties argued the MTA spent on political events. In response, the MTA's witnesses acknowledged documentary evidence that it had misallocated some time to the incorrect account.

(App. 38a-39a)

Later, the Commission continued:

> The field staff's political activity was isolated and enumerated by Janet Strecker, whose affidavit forms a basis for the adjustments for misallocated nonchargeable time undertaken in the [Hearing Officer's] Recommended Decision. We find that, on this record, the MTA met its burden of persuasion that its political time and activities can be isolated and segregated. *We are persuaded that Strecker's testimony, including the charts contained in her affidavit, contained a reasonable, good faith ledger of the Affiliate Service staffs' primary political activities.*

(App. 46a-47a) (emphasis added)

In *dicta* in *Air Line Pilots Association v. Miller*, 523 U.S. 866, 877-78 (1998), this Court discussed the long-acknowledged constitutional obligation of the union to carry the burden of proof in this kind of litigation. The Court went on to say that the employees cannot simply "sit back," but must make their objections known. Here, as quoted above, the Labor Commission held that the objecting teachers carried their burden of production by showing numerous errors in the union's employee timekeeping records.

Thereafter, the Commission allowed the union to carry its ultimate burden of proof on chargeable employee

time by simply admitting the "primary political activities"[4] of the union's employees.

Allowing the union to prove its political activities (*i.e.*, prove a negative fact) instead of its legitimate, chargeable activities conflicts with this Court's specific *rejection* of the idea that subtracting political expenses from the total is the same as proving chargeable expenses. *Hudson*, 475 U.S. at 306-07. The Commission noted that it had before it approximately 15,000 MTA expenditures. The Commission shied away from requiring the MTA to prove chargeable costs because "the MTA would have been required to produce evidence about every one of its approximately 15,000 expenditures." (App. 34a) Obviously, a judgment, one way or the other, was going to be made on each of those 15,000 expenditures. As a result, the teachers were burdened with proving the 15,000 expenditures were political, and the union's burden was reduced to admitting whatever the teachers proved.

4. The Burden of Trial Costs.

The 53-day agency fee hearing is recorded on 8,000 pages of transcript. In a case as complex as this, a transcript is obviously necessary to secure appropriate

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[4] The Strecker affidavit (Docket 121, pp. 63–88), relied upon by the Commission, contained a list of union meetings. (Docket 1287, p. 4860) Strecker admitted that the meetings involved planning or reporting on activity outside the meetings. (Docket 1287, pp. 4865-69) She also admitted that her charts only accounted for time inside the meeting. (Docket 1287, pp. 4882-83) This accounts for the Commission's reference to only eliminating *part* of the MTA's political expenses.

judicial review. But the Commission saddled the teachers with $25,000 of the court reporting bill, and refused to even consider ordering the use of a less expensive court reporter. The listing of the MTA's agency fee claims for each of the five years (*supra*, p. 3) shows that even if a teacher filed a challenge for all five years, the amount of the MTA's claim against each was less than $1,000. This cannot be squared with limiting as much as possible the transaction costs of those teachers seeking to vindicate their Free Speech rights.

Thus, from beginning to end, the Massachusetts procedure improperly burdened the rights of nonmembers. This burden began with an eight (8)-year long "prompt procedure," included the $25,000 court reporter's fee, and ended with evidentiary rules which consistently and obviously compelled the teachers to support the union's political and ideological activities.

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be granted, and the case set for plenary briefing and argument on the important questions presented herein on the most recent application of the *Street* experiment.

Respectfully submitted,

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December 2000

Supreme Court, U.S.
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No. 00-____

IN THE

Supreme Court of the United States

JAMES J. BELHUMEUR, *et al.*,

Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION;
SPRINGFIELD EDUCATION ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

APPENDICES TO PETITION FOR WRIT OF *CERTIORARI*

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December 2000

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SJC-08163

JAMES J. BELHUMEUR & others vs. LABOR RELATIONS COMMISSION.

Suffolk. April 4, 2000. - September 21, 2000.

Present: Marshall, C.J., Abrams, Greaney, Ireland, Spina, & Cowin, JJ.

Labor, Union agency fee, Collective bargaining, Judicial review, Public employment, Strike by public employees. School and School Committee, Collective bargaining, Strike by teachers. Public Employment, Collective bargaining, Strike. Constitutional Law, Labor, Freedom of speech and press, Union. Administrative Law, Agency, Judicial review, Hearing.

Appeal from a decision of the Labor Relations Commission.

The Supreme Judicial Court granted an application for direct appellate review.

Susan Lee Weissinger for Springfield Education Association.

Bruce N. Cameron, of Virginia, for James J. Belhumeur & others.

John B. Cochran for the defendant.

IRELAND, J. James J. Belhumeur and 118 other public school teachers throughout the Commonwealth[1] (collectively charging parties), filed multiple prohibited labor practice charges with the Labor Relations Commission (commission), challenging the amount of the agency fee[2] demanded by their collective bargaining representative, the Massachusetts Teachers Association (MTA)/National Education Association (NEA) and its local affiliates (collectively unions), over five fiscal years, 1987-1992.[3] After hearings on the MTA portion of the agency fee, the commission issued a decision concluding that the

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[1] The charging parties are teachers at public schools in the Commonwealth or at the University of Massachusetts, represented by a union for collective bargaining purposes, but are not members of the union. See G.L.c. 150E, § 12 (authorizing requirement that public employees pay agency fee to collective bargaining agent as condition of employment).

[2] See discussion of agency fee principles, infra at .

[3] Over several years, the charging parties have filed hundreds of prohibited labor practice charges with the commission, challenging both the adequacy of the financial disclosure supporting the unions' agency service fee demands as well as the amount of the fees. In 1990, the commission consolidated many of the charges and dismissed the portion of the charges challenging the adequacy of the financial disclosures for most of the unions involved. We affirmed that decision. See Belhumeur v. Labor Relations Comm'n, 411 Mass. 142 (1991), cert. denied sub nom. Belhumeur v. Massachusetts Educ. Ass'n, 503 U.S. 1004 (1992). The commission did issue complaints challenging the adequacy of the financial disclosure for three of the local unions. Those cases were tried separately and, in 1997, the commission issued a decision concluding that the disclosures were inadequate. We affirmed that determination. See Wareham Educ. Ass'n v. Labor Relations Comm'n, 430 Mass. 81 (1999).

MTA had demanded an excessive agency fee. See Matter of Springfield Educ. Ass'n, Mass. Teachers Ass'n, Nat'l Educ. Ass'n & Belhumeur, 23 M.L.C. 233 (1997). Both the charging parties and the unions appealed. We granted their joint application for direct appellate review and now, with three modifications, remand the case to the commission for the entry of an order consistent with this opinion.

1. Factual background. Prior to the start of the hearings on the MTA portion of the service fee, the unions and the charging parties executed a partial settlement agreement. The agreement provided that, for the five contested fiscal years, the amount of the MTA portion of the agency fee would be determined by litigating a single representative year, 1990-1991. The settlement agreement also provided that the amount of the NEA portion of the agency fee would be based on a percentage of the MTA fee. The parties did not agree concerning the amount of the local fees. The commission subsequently ordered the hearings bifurcated.

The hearings on the MTA portion of the service fee began on February 8, 1993, before a hearing officer specially designated by the commission, and continued intermittently for fifty-three days, ending on December 14, 1994. Posthearing briefing concluded in July, 1995, after both parties had requested extensions of the briefing schedule. On March 21, 1996, the designated hearing officer issued a 240-page recommended decision containing extensive findings of fact and conclusions of law. The charging parties and the unions filed numerous objections to the recommended decision. On April 23, 1997, the commission issued a final decision and order

expressly adopting the majority of the findings and conclusions in the recommended decision.

In its decision, the commission examined MTA's expenditures for the fiscal year 1990-1991 to determine those union expenditures that were "chargeable" to the nonmembers and those expenditures that were "not chargeable." The commission concluded that MTA had demanded $26.77 in excess service fees from each of the nonmembers.[4]

In reaching its conclusion, the commission formally adopted a framework for analyzing challenges to the amount of agency fees. The commission stated that once the amount of the agency service fee was challenged by a nonmember, the "union bears the burden of producing sufficient evidence to persuade us that the fee reflects the fee-payer's proportionate share of the union's chargeable expenditures." The commission further stated that, in order to prove the amount of the agency fee:

> "[A] union may rely on a prima facie showing that its service fee calculations are correct. . . . Therefore, a union's initial burden is to produce enough credible detail to warrant a finding that identified expenditures are chargeable. Unless an included expense is inherently related to collective bargaining, like grievance arbitration fees, a union must show by detailed documentary or reliable testimonial evidence that a particular expense is chargeable. . . .

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[4] The commission reached this conclusion by dividing the total chargeable expenses established in the proceedings – $8,675,253 – by the number of union members and agency fee payers -- 60,276 -- for a per capita cost of $143.93. The MTA had demanded $170.70.

"Once a union makes its prima facie showing of chargeability, the objecting fee payer assumes a limited burden of production to probe the union's evidence and produce some evidence to rebut the union's prima facie showing. . . . However, at all times, a union retains the ultimate burden of persuasion."

2. Agency fee principles. It is well settled that "[p]ublic employees who are not union members may be required, as a condition of their employment, to pay an agency fee to their collective bargaining representative to support the costs of the bargaining process, contract administration, and grievance adjustment." Lyons v. Labor Relations Comm'n, 397 Mass. 498, 501 (1986), citing School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 72-73 (1982), and Abood v. Detroit Bd. of Educ., 431 U.S. 209, 225-226 (1977). It is equally well settled that public employees have a right, based in the First Amendment to the United States Constitution, to prevent the union from spending part of the agency fee to support ideological causes not germane to the union's duties as collective bargaining representative. See Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees, 466 U.S. 435, 447 (1984); Lyons v. Labor Relations Comm'n, supra, quoting Abood v. Detroit Bd. of Educ., supra at 234. See also G. L. c. 150E, § 12.

Consistent with these principles, a union must implement certain procedures before it may validly demand payment of an agency fee. See Chicago Teachers Union Local No. 1 v. Hudson, 475 U.S. 292, 306, 310 (1986). "[T]he constitutional requirements for the Union's collection of agency fees include an adequate explanation

of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." Id. at 310.[5]

If a nonmember objects to the amount of the agency fee on the basis that the fee includes expenditures for ideological activities unrelated to collective bargaining, the nonmember has an obligation affirmatively to raise that objection. See Chicago Teachers Union Local No. 1 v. Hudson, supra at 306; School Comm. of Greenfield v. Greenfield Educ. Ass'n, supra at 82. Once a nonmember has raised an objection, the union bears the burden of proving, by a preponderance of the evidence, the accuracy of the agency fee. See Chicago Teachers Union Local No. 1 v. Hudson, supra (because union possesses facts and records, "basic considerations of fairness compel" that union bears burden of proof); Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, supra at 457 n.15; School Comm. of Greenfield v. Greenfield Educ. Ass'n, supra.

On appeal, the charging parties argue that they were denied a reasonably prompt hearing on their challenge; that the commission used an improper formula to compute the agency fee; and that when a union conference or meeting combines chargeable and nonchargeable activities, the union should be required to submit evidence that each expense was exclusively incurred in furtherance of chargeable activity. Additionally, both the charging parties and the unions challenge several of the

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[5] See Hogan v. Labor Relations Comm'n, 430 Mass. 611, 613 (2000) (outlining statutory procedural prerequisites, contained in G. L. c. 150E, § 12, for union's collection of agency fees).

commission's conclusions regarding whether particular union expenditures were chargeable.

3. Issues on appeal. a. Level of review. As an initial matter, the charging parties contest the nature of review applicable to the commission's decision. The charging parties contend that, because the determination whether a particular union expenditure is chargeable is a constitutional determination, we are required to conduct a de novo review of the entire record. We disagree.

As we have stated numerous times, our review of a commission decision is governed by G. L. c. 30A, § 14. See Hogan v. Labor Relations Comm'n, 430 Mass. 611, 613 (2000); Lyons v. Labor Relations Comm'n, supra at 503. See also G. L. c. 150E, § 11 (review of commission decision governed by G. L. c. 30A, § 14 "insofar as applicable"). In accordance with the statute, we "give due weight to the experience, technical competence, and specialized knowledge of the agency." G. L. c. 30A, § 14 (7). To the extent the commission's decision involves issues of law, however, we review the decision de novo. See G. L. c. 30A, §§ 14 (7) (a) ("[i]n violation of constitutional provisions") & (c) ("[b]ased upon an error of law"). The determination whether a particular union expenditure is chargeable involves both questions of law, which we review de novo, as well as questions of fact, which are for the commission in the first instance. See Harrison v. Massachusetts Soc'y of Professors/Faculty Staff Union/MTA/NEA, 405 Mass. 56, 59 (1989) (challenges to amount of agency fee appropriately decided by the commission in first instance); Lyons v. Labor Relations Comm'n, supra at 501 (acknowledging constitutional basis to employee's challenge to amount of agency fee); School Comm. of Greenfield v. Greenfield Educ. Ass'n, supra at 76

(determining amount of service fee is technical issue within expertise and jurisdiction of commission). See also Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 531-532 (1991) (Court of Appeals properly reviewed District Court fact finding for clear error). Cf. Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, supra at 448-455.

b. Reasonably prompt hearing. The charging parties contend that, because there was a nearly eight-year interval between the time the original challenge to the amount of the agency fee was filed in 1989 and the issuance of the commission's final decision in 1997, the commission did not provide a reasonably prompt hearing as required by Chicago Teachers Union Local No. 1 v. Hudson, supra at 310.[6] Whether a hearing takes place in reasonably prompt manner will necessarily depend on the circumstances of the case, and, in the circumstances of this case, we conclude that the commission did provide a reasonably prompt decision.

First, much of the delay through mid-1992 was attributable to the charging parties' requests to stay the proceedings until Belhumeur v. Labor Relations Comm'n, 411 Mass. 142 (1991), cert. denied sub nom. Belhumeur v. Massachusetts Educ. Ass'n, 503 U.S. 1004 (1992), was issued, and their petition for certiorari in that case was decided. Second, the case involved a substantial number of factual and legal issues, and required the commission to

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[6] The charging parties also argue that, because the commission failed to provide a prompt hearing, the commission was required to adhere to the "judicial rules of evidence." The charging parties have cited no authority for this proposition. Because we conclude the commission did provide a decision that was reasonably prompt in the circumstances of the case, we do not address this issue.

receive and examine a great deal of evidence. The charging parties alone introduced approximately 1,400 documents.[7] While we acknowledge that, in other circumstances, an eight-year interval most likely would not satisfy the reasonably prompt hearing requirement, on these facts, we conclude it did.[8]

c. Formula used by commission to compute agency fee. Next, the charging parties contest the formula used by the commission to determine the agency fee. The commission determined the per capita agency fee by totalling expenses it concluded were chargeable and then dividing that number by the number of bargaining unit members. See note 4, supra. The charging parties argue that, because the use of the commission's alternative formula[9] would result in a lower fee, the commission was required to utilize the other formula. We do not agree.

Even if we assume that using another formula to calculate the agency fee would result in a lower fee, the

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[7] Although it is not clear why twenty-two months were necessary in order to schedule fifty-three days of hearings, the charging parties make no claim of bad faith or dilatory tactics.

[8] None of the cases cited by the charging parties, in support of their claim that much shorter delays are unconstitutional, mandates a conclusion that this proceeding was unconstitutional.

[9] In Dailey & Woburn Teachers Ass'n, 13 M.L.C. 1555, 1564 (1987), the commission held that two formulas could be used to calculate the agency fee. The first method, the one used here, divides the chargeable expenses by the number of members of the bargaining unit. The second method calculates the percentage of chargeable expenditures to nonchargeable expenditures and applies that percentage to the dues amount -- that is, if 75% of union expenditures are chargeable, then the agency fee is 75% of the union dues.

formula used by the commission calculated the nonmember's actual per capita share of the chargeable costs. As such, the nonmember was not required to contribute to nonchargeable union activities and there was no intrusion on the nonmember's First Amendment rights. See, e.g., Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977). The commission's use of the formula was therefore proper.

d. Mixed activity union events. Relying on Schneider v. Colegio de Abogados de P.R., 917 F.2d 620, 633-634 (1st Cir. 1990), the charging parties ask us to require the commission to apply the following rule: when chargeable and nonchargeable activities are combined at a union meeting or conference, none of the expenses related to that event is chargeable unless the union "proves" that each individual expense was incurred in furtherance of an exclusively chargeable activity.[10] The charging parties identify several union events to which they argue the rule should apply.[11] We decline to impose the proposed across-the-board rule.

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[10] Along a similar line of reasoning, the charging parties also contend that when a union's expense category -- an expense category may include expenses related to multiple events or functions -- contains chargeable and nonchargeable activities and expenses, the union is required to "prove" that each and every expense in the category is devoted exclusively to chargeable activity. The mere fact that an expense is listed in an accounting expense category that combines chargeable and nonchargeable activities has no bearing on whether the activity itself is chargeable, and therefore should have no effect on the amount of proof the union must provide relative to it.

[11] These identified events range from large union conferences to the meetings of the union's board of directors.

First, the proposed rule is not mandated by the cited case. In Schneider v. Colegio de Abogados de P.R., supra, a bar dues case, the court, in dicta, contemplated a hypothetical annual meeting of the bar organization where "business matters of direct concern" to the membership would be discussed but where also the chaplain would recite a prayer for Fidel Castro and the featured speaker was a prominent Sandanista. The court speculated even if the prayer and speaker took up only a portion of the meeting, it would be likely that the atmosphere at the meeting "would have become so partisan" that the cost of the entire meeting should be deducted. Id. In other words, "where the permissible and impermissible are intertwined beyond separation," none of the costs associated with the meeting should be allowed. Id. at 634.

Second, the United States Supreme Court has not applied such a rule when determining whether particular union meetings are chargeable. For instance, in Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, supra at 448-449, the Court held that a union's national convention was a chargeable activity. The Court observed that the convention was essential to the "union's discharge of its duties as bargaining agent," id. at 449, because a union must have the ability to maintain its organizational existence, elect officers to manage the daily business of the union, and must be allowed to consult its members about over-all bargaining policy. Similarly, in Lehnart[sic] v. Ferris Faculty Ass'n, 500 U.S. 507, 529-530 (1991), the Court held that the local union's expenses of sending delegates to the State and national convention were chargeable because participation by the members of the local in the activities of the parent was likely an important

benefit of affiliation, and because, like in the Ellis case, the convention was essential to the union's performance of its duties.

Furthermore, as stated earlier, the union always bears the burden of persuading the fact finder that an expense, or a portion of that expense, is chargeable. See Brotherhood of Ry. & S.S. Clerks v. Allen, 373 U.S. 113, 122 (1963). The fact that chargeable and nonchargeable activities were combined at a union event should not automatically invalidate all the expenses of the event, nor should it necessarily impose a greater burden on the union. Instead, we conclude that the amount and detail of the evidence a union is required to produce, as a matter of law, in order to meet its burden of persuasion, depends on a variety of factors. These factors include, but are not limited to, the nature and purpose of the event, the types of attendees at the event and their level of participation, as well as the nature and extent of the political activity at the meeting. See Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, supra at 448-450 (union conventions necessary to governance of union held chargeable; costs of refreshments served at union social event open to nonmember held chargeable); Lehnart[sic] v. Ferris Faculty Ass'n, supra (costs of sending local delegates to national conventions held chargeable). Cf. Brotherhood of Ry. & S.S. Clerks v. Allen, supra at 122 (absolute precision in calculation of agency fee not required). The amount and detail of the evidence necessary for the union to meet its burden of persuasion will also depend on the evidence offered by the charging parties to rebut the union's claim that an expense is chargeable. Cf. Air Line Pilots Ass'n v. Miller, 523 U.S. 866, 878 (1998) ("With the Hudson notice, plus any additional information developed through

reasonable discovery, an objector can be expected to point to the expenditures or classes of expenditures he or she finds questionable").[12]

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[12] Citing to Chicago Teachers Union Local No. 1 v. Hudson, 475 U.S. 292, 306-307 (1986), the charging parties also contend that the commission erred because it accepted, as proof of chargeable activity, the union's admissions of nonchargeable activity. In particular, the charging parties contest the "Strecker affidavit" which the union introduced in an effort to prove the allocation of staff time between chargeable and nonchargeable activities. We need not decide whether the cited case is applicable to this case, see note 7, supra, or whether the Strecker affidavit is properly characterized as only an admission of chargeable activity. Here, the record is clear that the union introduced, and the commission credited, other evidence to support the allocation of staff time.

The charging parties also identify several "political" meetings which they claim the commission decided incorrectly. See note 11, supra. The nature and extent of the charging parties' challenge to these determinations, beyond that discussed in the text, is unclear. Regardless, to the extent that the charging parties challenge the commission's factual findings and credibility determinations, we decline to disturb those findings; and to the extent that the charging parties challenge the commission's conclusions of law, we affirm those conclusions.

As to each meeting or type of meeting challenged, the commission made detailed findings as to who attended; the purpose of the meetings and the topics discussed; where possible the commission identified and deducted discrete nonchargeable activities, or estimated and deducted the amount of political activity, or found that the political activity was incidental. The commission also made findings about the importance of the meeting to the governance or institutional integrity of the union, as well as findings about the importance of the meeting to the over-all collective bargaining relationship.

Further, we do not think the commission's application of a "presumption" to certain types of meetings -- for example, the

e. Challenges to the commission's classification of particular expenditures. As stated by the United States Supreme Court, in order to qualify as a chargeable expense, the union expenditure "must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." Lehnart[sic] v. Ferris Faculty Ass'n, supra at 519. See Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, supra at 448 (test is whether "expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees"). The Court has recognized that there may be "difficult problems in drawing lines" between chargeable and nonchargeable activities, and that this is particularly true in the public sector where legislative or other public authority action is often necessary in order to execute or implement a collective bargaining agreement. See Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977).

(1) Accounting. The charging parties challenge the commission's conclusion that all of the union's accounting expenses were chargeable. The commission reached this conclusion by applying a presumption adopted in a previous decision: overhead expenditures necessary to

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commission presumed the MTA's management meetings and board of directors' expenses were fully chargeable unless an expense was proved to be exclusively nonchargeable -- shifted the burden of persuasion to charging parties. Rather, we think the "presumption" affected only the charging parties' burden of production, and, given the facts previously found by the commission, did so within proper bounds.

maintain the union's organizational existence, such as rent, property insurance, accounting and auditing costs, and the costs of a union convention, are presumed to be fully chargeable unless there is evidence that the expense was incurred in furtherance of an exclusively nonchargeable activity. See Newton Teachers Ass'n & Roman, 13 M.L.C. 1589, 1596 (1987).[13] The commission found, but dismissed as de minimis, that accounting personnel had devoted fourteen hours to exclusively nonchargeable activity. The charging parties argue that accounting costs should not be presumed to be fully chargeable, but should be apportioned according to the union's over-all chargeable activities -- that is, if only fifty per cent of the union's nonoverhead expenses are related to chargeable activities, then only fifty per cent of the overhead expenses should be chargeable. Under the Ellis reasoning, we conclude the commission, with one modification described in the next paragraph, was correct.

In Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, supra at 448-449, the Court held in relevant part that a union's expenses in connection with its national convention were chargeable. The Court reasoned that in order to perform its functions as a collective bargaining representative, a union must be able to "maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its

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[13] In order for the commission to apply the presumption, the union must first produce "some evidence that the expense was incurred in connection with the union's function as a collective bargaining agent." Newton Teachers Ass'n & Roman, 13 M.L.C. 1589, 1596 (1987). The charging parties make no claim that such evidence was not introduced.

members about overall bargaining goals and policy." Id. at 448. We agree with the commission's reasoning that certain overhead expenses, including accounting expenses, are necessary for a union to maintain its corporate existence, and these expenses will be incurred in roughly the same amounts regardless of the amount of the union's nonchargeable expenses. Also important to our conclusion is the fact that overhead expenses such as rent and accounting fees have no communicative or political speech aspect. Such expenses therefore pose no additional burden on the nonmember's First Amendment rights than that imposed by the agency shop itself. See Lehnart[sic] v. Ferris Faculty Ass'n, supra at 519; Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, supra at 456 (issue is whether union expenses "involve additional interference with the First Amendment interests"). See also Popejoy v. New Mexico Bd. of Bar Comm'rs, 887 F. Supp. 1422, 1429 (D.N.M. 1995) (office construction expenses fully chargeable; they have no communicative value and impose no additional burden on speech); Antry v. Educ. Labor Relations Bd., 195 Ill. App. 3d 221, 273-274 (1990) (accounting expenses fully chargeable). Where, as here, the commission identifies the nonchargeable activity, that amount should be subtracted from the chargeable costs. Cf. Chicago Teachers Union Local No. 1 v. Hudson, 475 U.S. 292, 305 (1986) (amount at stake does not diminish concern).

(2) Union officers' costs. The charging parties also challenge the commission's conclusion that the union's president's and vice-president's costs, such as their salaries and the president's assistant's salary, were chargeable in proportion to the union's over-all chargeable expenditures. The commission reached this conclusion by applying

another presumption: union officers' costs are apportioned according to the union's over-all chargeable expenditures, unless either party proves a different allocation in fact. See Matter of Springfield Educ. Ass'n, Mass. Teachers Ass'n, Nat'l Educ. Ass'n & Belhumeur, 23 M.L.C. 233, 245 (1997). See also Newton Teachers Ass'n & Roman, supra at 1596 (overhead expenses which could be directly affected by amount of union's nonchargeable activity, such as administrative salaries, postage, and telephone, are presumed chargeable to same extent as union's over-all chargeable activity).[14] The charging parties argue that the officers' costs should not be treated as overhead but instead should be chargeable only to the extent that the union can demonstrate, through contemporaneous time records, the officers' actual time spent on chargeable activities. We conclude that the commission was correct to treat the officers' costs as overhead and apportion them, and the evidence submitted by the union was sufficient to meet its burden of production.

First, the union's president and vice-president have primary roles in the management of the union and the functioning of it as an organization. See Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, supra at 448. Second, many of the officers' costs, particularly salaries and the like, are fixed and will be incurred regardless of

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[14] The union must establish by "credible record evidence that its officers have roles in governing the organization or otherwise sustaining its existence as a collective bargaining representative" before the commission will apply the presumption. Matter of Springfield Educ. Ass'n, Mass. Teachers Ass'n, Nat'l Educ. Ass'n & Belhumeur, 23 M.L.C. 233, 245 (1997), 23 M.L.C. 233, 245 (1997).

the amount of nonchargeable activity in which they are involved. Further, requiring senior executives such as these formally to document their activities with daily time sheets would be unduly burdensome and could interfere with the officers' ability to perform their functions. Cf. Brotherhood of Ry. & S.S. Clerks v. Allen, supra at 122; Fell v. Independent Ass'n of Continental Pilots, 26 F. Supp. 2d 1272, 1281 (D. Colo. 1998). The union is required to provide some reasonably reliable corroboration that the officers' general levels of chargeable activity were consistent with the union's over-all level of chargeable activity. That requirement was met here: the MTA submitted summary calendars of the officers' activities that had been prepared for the union's board of directors and that reflected the officers had engaged in a wide range of chargeable and nonchargeable activity. The commission found, and the charging parties do not dispute, that the officers' nonchargeable activity was not disproportionate to the MTA's over-all nonchargeable activity. The officers' costs were therefore chargeable to the extent of the union's over-all chargeable activity.

(3) Statewide strike discussions. The union contests the commission's conclusion that three expenses related to implementing a Statewide strike in Massachusetts or reporting or discussing Statewide strikes in other States were not chargeable.[15] The hearing officer found, and the

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[15] The three expenditures at issue are: (1) the four meetings of the Statewide Crisis Team, which the hearing officer found was formed to consider and coordinate a strike; (2) articles in Frontline, a union publication, which reported on strikes in Washington State; and (3) the travel costs of union representatives from other States who spoke about their experiences with Statewide strikes.

union does not dispute, that the objective of the Statewide strike was to publicize the condition of public education funding, and the simultaneous resolve of educators, thereby raising the profile of the issue of public education funding. We conclude the expenses were not chargeable.

In Lehnart[sic] v. Ferris Faculty Ass'n, supra at 520-521, 527 (plurality opinion of Blackmun, J.), the costs of a union program designed to secure funds for public education were held to be nonchargeable because the lobbying activities were not shown to be related to "the ratification or implementation of [the petitioners'] collective-bargaining agreement," and they thus fell outside the limited context in which political activities are chargeable. Id. at 520 (plurality opinion of Blackmun, J.). The purpose of the activity here is virtually identical; advocating for funding of public education in general is the type of political speech for which the union may not charge. With one exception, the union expenses related to the Statewide strike were not chargeable.[16]

The commission concluded that an article that appeared in the union publication, Frontline, and that offered communication points to use during "a strike or some other unusual event" was not chargeable because the article was geared toward strikes. We conclude that the article was more in the nature of "[i]nformational support services" that are not political and are intended to benefit all members of the bargaining unit, and was therefore chargeable. Lehnart[sic] v. Ferris Faculty Ass'n,

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[16] The commission concluded that these expenses were not chargeable because strikes by public employees are prohibited and therefore, discussion about the desirability of a strike is not a legitimate activity. We expressly decline to decide this issue.

supra at 529. See Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, supra at 450-451, 456.

(4) 1991 activities at the University of Massachusetts at Amherst. The hearing officer found that the university faculty had engaged in a demonstration, on April 17 and 18, 1991, in part to protest the State furlough program (see St. 1991, c. 6, § 90; German v. Commonwealth, 410 Mass. 445 [1991]) and the lack of funding of their collective bargaining agreements. She also found that the faculty had withheld expected services during those two days, and concluded that the activities were not chargeable because they were incident to a "two day job action." The commission concluded that regardless of whether the activities constituted a strike, they were not chargeable because the action was designed primarily to influence the higher education budget. We agree with the hearing officer.

General Laws c. 150E, § 9A, prohibits strikes by public employees and, accordingly, union expenses in connection with a strike are not chargeable. See Lehnart[sic] v. Ferris Faculty Ass'n, supra at 531. The union argues that the two-day job action was not a strike because the entire university community, including the administration, approved and participated in the protest. Whether anyone in the university administration explicitly or implicitly approved of the action is irrelevant. Because the hearing officer found that the faculty had withheld services, the action was a strike, and the expenses incident to it were not chargeable.

The union also challenges the commission's conclusion that the costs of flyers, distributed at the 1991 University of Massachusetts at Boston commencement

exercises, were not chargeable.[17] The commission concluded the flyers were not chargeable because their distribution was a public relations activity not germane to the union's collective bargaining functions. We agree.

In order for public relations, lobbying, or other political activity of a union to be chargeable, the activity must not merely advocate for the general support of the employees, their profession, or public employees, but instead must be in "the limited context of contract ratification or implementation." Lehnart[sic] v. Ferris Faculty Ass'n, supra at 522 (plurality opinion of Blackmun, J.). The costs of the flyer were not chargeable.

(5) Salisbury Proposition 2½ override campaign. Finally, the union challenges the commission's determination that funds the MTA reimbursed the Salisbury Teachers Association for expenses incurred in connection with a local Proposition 2½ (St. 1980, c. 580) override campaign were not chargeable. The commission found that the override campaign "was initiated exclusively for the purpose of rehiring teachers who had been laid off in mid-year and mid-contract [and] that all override revenues were used [apparently by agreement] to restore teaching positions." Matter of Springfield Educ. Ass'n, Mass. Teachers Ass'n, Nat'l Educ. Ass'n, & Belhumeur, 23 M.L.C. 233, 241 (1997). The commission concluded, however, that because the funds were "not necessarily committed to benefit the school contract," the union expenditures were not chargeable. Id. The union

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[17] The union contends that the flyers were distributed during an ongoing dispute over funding for a collective bargaining agreement. The commission made no such finding, nor has the union pointed to any support in the record for this fact.

argues that the override campaign expenses were chargeable because it was a political activity dedicated to implementing their collective bargaining agreement. We agree. See Lehnart[sic] v. Ferris Faculty Ass'n, supra at 522 (plurality opinion of Blackmun, J.). By working to obtain the public money necessary to fund the teachers' collective bargaining agreement, the override campaign activity was directed at implementing that agreement and therefore was chargeable, regardless of whether Salisbury was unconditionally bound to use those funds for that purpose. See Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, supra at 448 (union may charge for those activities "normally or reasonably employed" to fulfil its duties as exclusive representative). The costs associated with the override campaign were therefore chargeable.

4. Conclusion. The commission's decision is affirmed except for the three modifications discussed above: the commission should have deducted the identified fourteen hours of nonchargeable accounting time, but should not have deducted the costs of the Salisbury override campaign nor the costs of the article in the union publication. The case is remanded to the commission for entry of an order consistent with this opinion.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

AT BOSTON, September 21, 2000

IN THE CASE NO. SJC-08163

JAMES L. BELHUMEUR & others

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vs.

LABOR RELATIONS COMMISSION

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pending in the Labor Relation Commission

for the County of _____ **No.** ASF-2143

ORDERED, that the following entry be made in the docket; viz., --

The commission's decision is affirmed except for three modifications: the commission should have deducted the identified fourteen hours of nonchargeable accounting time, but should not have deducted the costs of the Salisbury override campaign nor the costs of the article in the union publication. The case is remanded to the commission for entry of an order consistent with the opinion.

BY THE COURT,

/s/, CLERK.

September 21, 2000

COMMONWEALTH OF MASSACHUSETTS
BEFORE THE LABOR RELATIONS COMMISSION

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In the Matter of	*	
	*	Case Nos. ASF-2143,
SPRINGFIELD EDUCATION	*	et al.
ASSOCIATION,	*	
MASSACHUSETTS TEACHERS	*	Date Issued:
ASSOCIATION, NATIONAL	*	April 23, 1997
EDUCATION ASSOCIATION,	*	
et al.	*	
and	*	
	*	
JAMES J. BELHUMEUR, et al.[1]	*	

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Commissioners participating:

Robert C. Dumont, Chairman
William J. Dalton, Commissioner
Claudia T. Centomini, Commissioner

Appearances:

Ann Clarke, Esq.	-for the Springfield
Brian Riley, Esq.	Education Associ-
Susan Lee Weissinger, Esq.,	ation, Massachu-
Margery Williams, Esq.	setts Teachers As-
	sociation, NEA,

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[1] Cases consolidated for this proceeding are listed at Appendix A.

Bruce Cameron, Esq. - for James J. Belhumeur,
Glenn Taubman, Esq. et al.

William C. Conner - Pro Se

DECISION AND ORDER

Statement of the Case

James Belhumeur, and numerous others (collectively referred to as the Charging Parties), filed charges with the Labor Relations Commission (Commission). The charges alleged that affiliates of the Massachusetts Teachers Association/National Education Association had demanded agency service fees for fiscal years 1987-88, 1988-89, 1989-90, 1990-91, and 1991-1992, in excess of the amounts permitted by M.G.L. c. 150E (the Law), in violation of Section 10(b)(1) of the Law.

In 1992, the Charging Parties (including Pro Se Challenger Conner), and the Massachusetts Teachers Association (MTA), the National Education Association (NEA) and the local union affiliates (Unions) executed a settlement agreement concerning the disposition of the issues relating to the agency service fees demanded for the contested fiscal years. The parties agreed that the lawful amount of the MTA portion of the agency service fees demanded from the Charging Parties for each of the five fiscal years in dispute would be based on the MTA's actual expenditures for fiscal year 1990-91. The settlement stipulated that the lawful amount of the NEA portion of the fees demanded would be ten percentage points less than the final chargeable percentage deter-

mined for the MTA. The parties reached no agreement concerning the amount of local fees.

The Commission ordered that the hearings regarding the local portions of the fees be bifurcated from a consolidated hearing involving the MTA and the NEA fee portions.[2] Pursuant to 456 CMR 17.13, the Charging Parties had a full opportunity to engage in pre-hearing discovery at the MTA offices in July and August of 1992.

Pursuant to 456 CMR 13.02, a formal hearing commenced on February 8, 1993 and continued intermittently for fifty-three (53) days thereafter, concluding on December 14, 1994. To expedite the litigation, the Commission modified its hearing procedures during the course of the proceedings. The Commission issued an Order on July 1, 1993 directing the parties to prepare and submit detailed affidavits from each witness, in lieu of direct examinations. Cross and re-direct examinations, however, were conducted in the presence of the Commission's designated hearing officer, thereby preserving the hearing officer's ability to render credibility determinations. All parties had a full opportunity to produce documentary and testimonial evidence. All parties filed post-hearing briefs and reply briefs.

Commission Hearing Officer Tammy Brynie issued Recommended Findings of Facts and Recommended Conclusions of Law on March 21, 1996.[3] The parties filed

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[2] With the exception of Conner, the pro se challengers filed settlements agreeing to be bound by the outcome of the case sub judice.

[3] The Commission designated Tammy Brynie as Commission Counsel, pursuant to Chapter 23, Section 9R and 456 CMR 18.04. The Recommended Decision is Appendix B.

objections to the Recommended Decision on or before April 24, 1996 and filed reply briefs on or before May 20, 1996.

DECISION

Introduction

The parties filed extensive objections to the Recommended Decision. The Charging Parties broadly challenge virtually all aspects of the decision and its analytical foundation. They argue that the Commission must utilize the strictest levels of scrutiny in reviewing the Recommended Decision because it involves constitutional considerations, and that the Recommended Decision should be accorded little weight or deference. Accordingly, we must initially address the charging parties' objections to the evidentiary standards applied and their objections to the burden of proof applied by the hearing officer.

The Commission is a quasi-judicial, administrative agency with specialized expertise in labor relations matters. Consistent with the instruction in School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70, 76 (1982), the Charging Parties' challenges to the amount of the Union's demand have been treated as a prohibited labor practice charge, pursuant to M.G.L. c. 150E, Section 10(b)(1). The instant hearing has been conducted in accordance with the Commission's standard rules, codified at 456 CMR 10.00 et. seq. Therefore, the Charging Parties' have received the benefit of the Commission's quasi-judicial procedures, rules and practices. The Charging Parties, however, suggest that, because there are constitutional issues involved, the Commission must adhere to judicial rules of evidence and procedure.

Contrary to the Charging Parties' suggestions, however, the United States Supreme Court has indicated that it "do[es] not agree ... that a full-dress administrative hearing, with evidentiary safeguards" is constitutionally required to determine an appropriate agency service fee rate. Chicago Teachers Union, Local 1 v. Hudson, 475 U.S. 292, 307 (1986). Instead, the Hudson Court indicated that a challenger's right to a reasonably prompt decision by an impartial decision maker may even be satisfied through the more informal arbitration process. Therefore, significant aspects of the Charging Parties' objections concern judicial and evidentiary process that, although substantially afforded by the Commission, they were not necessarily due.

After an exhaustive review of the parties' objections and the record, we conclude that the Recommended Decision accurately reflects the protracted record, renders appropriate and comprehensive findings of fact that are supported by the weight of credible record evidence, properly applies the correct analytical frameworks and relevant authorities and precedent, and reaches substantially correct conclusions. Therefore, except where specifically delineated below, we adopt the attached Recommended Findings of Fact and Recommended Conclusions of Law.[4]

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[4] Challenger Conner argues that a union is required to classify its chargeable expenses according to the categories outlined in Commission Rule 17.04. We adopt the hearing officer's recommended conclusion that the MTA was not obligated to specifically enumerate and categorize its costs according to 456 CMR 17.04. Challenger Conner's remaining objections substantially parallel those filed by the Charging Parties.

It is not necessary to iterate every determination made in the Recommendation Decision here, which would effectively require a de novo review of all aspects of the Recommended Decision. Rather, we will focus on material challenges raised by the parties' concerning the analytical framework applied by the hearing officer, the chargeability of various categories of expenses, and the chargeability determinations made on the record evidence. Based on our careful consideration of the parties' challenges, we have decided to modify the final fee calculations for the reasons discussed below.

Charging Parties' Motion for Judgment

As a threshold matter, the Charging Parties object to the hearing officer's recommendation that their Motion for Judgment be denied. Relying on Belhumeur v. Labor Relations Commission, 411 Mass. 142 (1991), the Charging Parties renew their claim that the MTA was required to "carefully craft" the instant demand and that the MTA has forfeited its right to collect any fee because of alleged defects in its demand.

We concur with the hearing officer's alternate rationales for recommending that the Charging Parties' Motion for Judgment be denied. We consider the present charging parties to be either precluded from re-raising the sufficiency of the identical demand deemed adequate in the previous Belhumeur litigation or, in the alternative, that clear language in Belhumeur substantively disposes of the Motion for Judgment.

The Charging Parties contend that the hearing officer failed to specify the legal doctrine applied in reaching her recommendation that they should be precluded from recontesting the sufficiency of the instant demand. The

initial Belhumeur litigation focused on the accuracy of the present demand, and the Supreme Judicial Court determined that the demand is adequate. Under the doctrines of res judicata or issue preclusion, the governing rationales are identical: the stability and finality of decisions and judicial economy. The Charging Parties' objections to the recommendation that Belhumeur precludes further challenges to the accuracy, or to the crafting, of the current demand are not compelling because the court has already found the demand adequate. Therefore, the recommendation that the current claim is precluded is adopted.

In the alternative, by its clear language, Belhumeur substantively disposes of the Motion for Judgment. The Charging Parties argue that, because they are constitutionally-protected from assuming too great a litigation burden when a union does not carefully craft its agency fee demand, the union is not entitled to a full-blown trial to justify the amount of the fee demanded. However, Belhumeur does not support the charging parties' argument on that point.

> The information that the union must provide under the Hudson opinion is not intended to be dispositive of any dispute. That information is designed only to permit an agency service fee payer to decide whether to oblige the union to prove that the agency fee charged was properly determined. Belhumeur, 411 Mass. at 146.

Accordingly, the Charging Parties' Motion for Judgment is denied.

Burden of Proof/Prima facie Case

We are persuaded that the analytical model and concomitant burdens of proof and persuasion articulated by the hearing officer in her Recommended Decision are appropriate. She correctly noted that M.G.L. c. 150E, Section 12, as limited by the First Amendment to the United States Constitution, permits a public sector union to collect a service fee from non-members to cover its pro rata share of the costs of collective bargaining and contract administration. Lyons v. Labor Relations Commission, 397 Mass. 498, 501 (1986). For a union expenditure to be constitutionally-charged to an objecting non-member, it must: 1) be germane to collective bargaining activity; 2) be justified by the government's vital policy interest in labor peace and avoiding free riders; and 3) not significantly add to the burden of free speech that is inherent in the allowance of an agency or union shop. Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991).[5] A union that demands an excessive fee violates M.G.L.c. 150E, Section 10(b)(1). School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70, 76 (1982).

Public employees who object to the amount of a fee demanded are responsible for voicing their objections. Chicago Teachers Union, Local 1 v. Hudson, 475 U.S. 292 (1986), Abood v. Detroit Board of Education, 431 U.S. 209, 238 (1977). An employee who objects to the

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[5] We recognize the delineation of permissible and impermissible expenditures contained within the Commission's regulations, 456 CMR 17.04, to be outdated in light of Lehnert. We also apply the more widely recognized chargeable and nonchargeable terminology here, rather than the earlier permissible and impermissible categories.

amount of the fee must voice that objection by filing a prohibited practice charge with the Commission. However, once the fee is challenged, the union bears the burden of producing sufficient evidence to persuade us that the fee reflects the fee-payer's proportionate share of the union's chargeable expenditures. Greenfield, Id. at 85; 456 CMR 17.15(2).[6]

This does not mean, however, that a union must present exhaustive evidence in its case-in-chief about every single union expenditure and every specific union activity during the period for which the fee is claimed. Instead, as the Commission has previously indicated, a union may rely on a prima facie showing that its service fee calculations are correct. Dailey and Woburn Teachers Association, 13 MLC 1555, 1564 (1987); Pultz and Milford Teachers Association, 13 MLC 1568, 1577 (1987); Newton Teachers Association and Roman (Newton I), 13 MLC 1589, 1595 (1987); Brown and Chicopee Fire Fighters, 14 MLC 1241, 1251 (1987). Therefore, a union's initial burden is to produce enough credible detail to warrant a finding that identified expenditures are chargeable. Unless an included expenditure is inherently related to collective bargaining, like grievance arbitration fees, a union must show by detailed documentary or reliable testimonial evidence that a particular expense is chargeable. Dailey and Woburn Education Association, 13 MLC at 1564-65.

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[6] To demonstrate that its fee includes only the employee's pro rata share of collective bargaining expenses, the union must demonstrate those expenses that are chargeable as well as the total number of employees represented. Woburn Teachers Association, 13 MLC 1555(1987); 456 CMR 17.04.

Once a union makes its prima facie showing of chargeability, the objecting fee payer assumes a limited burden of production to probe the union's evidence and produce some evidence to rebut the union's prima facie showing. In meeting this limited burden of production, an objecting fee-payer is aided by 456 CMR 17.13, which affords an opportunity for pre-hearing discovery.[7] However, at all times, a union retains the ultimate burden of persuasion.

In their challenges to the Recommended Decision, the Charging Parties argue that, at all times, the MTA bears the total and unavoidable burden to demonstrate that every expenditure is chargeable. They contend that, no burden, not even a limited burden of production, may be imposed upon objecting non-members. Charging Parties argue that the analytical framework and burdens of production and persuasion employed in the Recommended Decision are so egregiously wrong that a de novo review and an entirely new decision is required.

The litigation model advanced by the Charging Parties portends chaos. Absent the ability to develop a prima facie case, the MTA would have been required to produce evidence about every one of its approximately 15,000 expenditures. Neither Commission personnel, nor the MTA, would have known which expenditures were at issue, or why, until the post-hearing submissions were received. Moreover, every MTA employee would have

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[7] Rule 17.13 provides, in pertinent part:

At least seven (7) days before hearing the bargaining agent upon request shall make available to the charging party the books and records on which the bargaining agent relies to justify the amount of the service fee demanded.

had to testify about every undertaken activity while the charging parties' sat silently. The procedure apparently advocated by the Charging Parties would entail receiving into evidence an encyclopedic array of material, regardless of whether it directly relates to an expenditure the non-members ultimately contest. The collection and analysis of the mountain of material could delay the Commission's ability to expeditiously identify any truly nonchargeable expenditures and could be unduly burdensome to all parties.

Contrary to the Charging Parties' assertions, it is useful to recall that the original burden of proof allocation in agency fee matters was dictated by common sense principles, not constitutional mandates. Because a union "possess[es] the basic facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion." Railway Clerks v. Allen, 373 U.S. 113, 122 (1963). However, through 456 CMR Rule 17.13, the Commission has equalized the parties' access to the books and records upon which a fee is based.[8] Thus, it is equitable for charging parties to bear a limited burden of production, to probe a union's evidence and produce some evidence to rebut a union's prima facie showing because the objecting fee payers have full access to all of a union's pertinent books and records prior to a hearing on the amount of the fee.

The Charging Parties provide scant supporting authority for their argument that a prima facie case model

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[8] Here, the overwhelming majority of exhibits submitted were produced during the pre-hearing discovery process.

transgresses constitutional mandates. The Charging Parties have cited no cases to show that the burdens of proof and production in agency fee challenges are constitutionally required to remain with a union at all times. The decision of the U.S. District Court in Lehnert, 643 F. Supp. 1306, 1327 (W.D.Mich. 1986), cited by the Charging Parties for the proposition that they bear no litigation burden, is not persuasive. There, the court expressed concerns with requiring challengers to sort through unidentified but assumed chargeable expenses. Here, in contrast, the MTA identified its chargeable expenses in MTA #1 and provided the underlying books and records in accord with 456 CMR 17.13, thus enabling the objecting non-members to probe the union's evidence. Therefore, charging parties with service fee cases in Massachusetts have full access to the information they need to respond to a union's prima facie case.[9]

In contrast, the paradigm we adopt mirrors the analogous burdens of persuasion and production assumed by 10(a)(3) litigants in discrimination cases. The standard proposed and applied in the Recommended Decision required the Union to carry the ultimate burden of persuasion concerning the chargeability of its expenditures, a burden like that borne by an alleged discriminatee. See, e.g., Trustee of Forbes Library v. Labor Relations Commission, 384 Mass. 559, 566 (1981); Wheelock

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[9] Although the charging parties rely on Knowles v. Gilman, 362 Mass. 642 (1972) in support of their position that they bear no burden of proof or production, that case is inapposite. Unlike agency service fee challenges, Knowles involved a bailor/bailee relationship where there is no discovery available to a bailor to enable it to determine what occurred while an item was in the possession of a bailee.

College v. Massachusetts Commission Against Discrimination, 371 Mass. 130 (1976).

The prima facie case analytical model promotes sound labor policy. We must recognize and, ultimately, accommodate seemingly divergent interests. The right of objecting non-members not to pay significant amounts for the support of union activities unrelated to collective bargaining necessarily coexists with the right of a union to be reimbursed for the service it provides such fee payers. School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70, 85 (1982). The right of fee payers to insist that the agency service fee calculations have an adequate evidentiary basis must be harmonized with the Hudson charge that all parties to the fee determination should have a reasonably prompt decision. Hudson, 475 U.S. at 307. Likewise, the proceedings adjudicating the amount of an agency service fee should not be so complex and burdensome that they consume an inordinate amount of the litigants' funds or exhaust the limited resources of the Commission or the appellate courts. Therefore, the prima facie case frame work strikes an appropriate and careful balance between the compelling competing interests.

The MTA's prima facie case.

We conclude the MTA met its prima facie burden concerning the chargeability of its programs. The MTA introduced evidence concerning its membership numbers and the per capita basis upon which it based its agency service fee demand. All five regional managers within the Affiliate Services division and managers within every other division that performed services for which the MTA seeks to charge non-members testified about their activi-

ties. Divisional quarterly reports outlining the division's activities were introduced, and witnesses provided substantial supporting details concerning the nature of their activities. All routine MTA publications and the minutes from the Board of Directors and Executive Committee meetings were introduced into the record. The MTA submitted a complete financial chronology of its activities for Fiscal Year 1991, in the form of its general ledger, as well as detailed information about its accounting system. Finally, the MTA's demand, including relevant budget information, is part of the record. Therefore, the MTA's testimonial and documentary evidence were sufficient to meet its prima facie burden concerning the chargeability of its programs. See Dailey and Woburn Teachers Association, 13 MLC at 1564-65; Pultz and Milford Teachers Association, 13 MLC at 1576.

After the MTA met its prima facie burden, the Charging Parties met their production burden by calling into question aspects of the Union's prima facie case.[10] The Charging Parties challenged the reliability of the MTA's time keeping system and provided examples of activity the MTA considered chargeable to non-members that the Charging Parties argued the MTA spent on political events. In response, the MTA's witnesses acknowledged documentary evidence that it had misallocated some time

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[10] Although the Charging Parties' argued that all litigation burdens remain unalterably on the MTA, they produced extensive evidence, including approximately 1,400 exhibits, largely secured during the pre-hearing discovery process, pursuant to 456 CMR 17.13, in an effort to undermine the Union's chargeability assertions.

to the incorrect account.[11] In addition, the MTA submitted a report by Auditor Joel Aronson (Aronson) concerning the overall trustworthiness of the MTA's time accounting system.[12]

At hearing, the MTA conceded that certain nonchargeable activities were misallocated to chargeable program codes. The Charging Parties contend that it is not plausible that staff misallocated only the hours that the MTA identified and suggest that the Commission infer that further significant misallocated nonchargeable activity was occurring. However, the record does not support the Charging Parties' hypothesis. Despite the exhaustive evidence about the MTA's activities, the evidence contains no hint that the MTA concealed nonchargeable activity. Therefore, we conclude that the Charging Parties' argument on this point is merely speculative. Absent evidence to the contrary, we are persuaded that the instances of significant misallocated activity identified by the MTA are the only ones that occurred, and the assessed amount of the fee has been reduced to reflect those misallocations.

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[11] For example, the MTA offered detailed charts accompanying Janet Strecker's affidavits correcting misallocation of nonchargeable activities within the Affiliate Service Division.

[12] The Charging Parties criticize, at some length, aspects of the design and implementaion of Aronson's test of the time keeping system. They object to the admission of Aronson's report into evidence and argue that the hearing officer should not have relied on his conclusions. However, we need not determine whether Aronson's report was properly admitted into evidence because the record contains sufficient evidence, apart from Aronson's report, to support our finding that the MTA's record keeping was reliable overall.

Finally, contrary to the Charging Parties' repeated contentions, the undisputed fact that individual MTA staff members allocated identical activities to different program codes does not render the Union's entire time reporting system unreliable. Instead, we are persuaded that, in a service industry, there are obstacles to precisely describing and labeling the activities of employees. The approach apparently advanced by the Charging Parties, to have all employees attending a staff meeting, for example, identify the meeting and code the event as "staff meeting," casts no light upon the chargeable or nonchargeable content or nature of the meeting. Instead, it is more appropriate to look at the overall purpose of an activity, or the individual's purpose in engaging in the activity, when ascribing an activity code and evaluating the activities' chargeable or nonchargeable character.

The standard of reasonableness

It is well-established that absolute precision in calculating an agency service fee is not and should not be expected or required. See, e.g., Allen, 373 U.S. at 122; Abood, 431 U.S. at 234, n. 40; Hudson, 475 U.S. at n. 18. In their objections, the Charging Parties contend that, to pass constitutional muster, union employee expenses must be allocated directly to the underlying activity. Instead, the MTA allocates an employee's expenses in proportion to the individual's time allocations. Although the MTA's expense system may occasionally result in allocating political expenses to chargeable programs, it is equally likely, based on the record evidence, that collective bargaining expenses may sometimes be assigned to nonchargeable programs. Overall, we consider the MTA's expense allocation methodology to be reasonable. We are

not persuaded that a union must separately detail and track each individual expense to an isolated underlying activity with the rigidity and specificity suggested by the Charging Parties.

Likewise, we are not persuaded by the Charging Parties' objections to the value per hour methodology used by the MTA and relied on by the hearing officer in determining the value of staff time misallocated to chargeable activities. Instead of determining the individual hourly wage rate for each of its professional staff, the MTA calculated the mean personnel cost for each regional or divisional office. The root of the Charging Parties' complaint is that the resulting value per hour figures lack precision. We conclude, however, that the value per hour figure is a reasonable and appropriate accounting method. The MTA's value per hour for its divisional staff is higher than any individual employee's hourly rate, because it builds the support staffs' salary into the equation. Therefore, using the value per hour figure, as opposed to an individual's salary, favors the Charging Parties.

We cannot achieve certainty, complete accuracy, or absolute precision in setting an agency service fee. An agency fee calculation cannot be made with mathematical exactitude because it is largely based on human components. We will not require a union's employees to document their activities with unerring meticulousness and will not require absolute precision concerning the costs of undertaken activities and their corresponding, distinct expenses. It is sound labor policy, as well as plain common sense, to accept reasonable, good faith estimates instead of the precision suggested by the Charging Parties.

Deviations from the MTA's Initial Demand

The MTA argues that, in certain instances, the Charging Parties should be charged more than it originally demanded of them. The MTA represents that there have been increases in areas where a portion of total costs had been erroneously omitted when calculating the initial demand, or where charges were sought for activities that had been originally, and mistakenly, designated nonchargeable. We conclude that Charging Parties had an opportunity to explore evidence of the intended charge and we permit the MTA, in some instances, to increase portions of its demand provided that the chargeable costs of each division does not exceed the original demand. Because the Charging Parties had sufficient notice of and an opportunity to explore evidence concerning the intended change, we conclude that the Charging Parties were not unduly prejudiced by any deviations from the MTA's initial demand.[13]

Therefore, the MTA is permitted to restore gross figures to its expenditure baseline and is permitted to fully charge for Administration and Personnel 2.0 -- the property management account. The MTA is permitted to restore gross costs to programs and divisions because including the gross amounts provides a more complete and accurate picture of the MTA's overall costs for the year at issue. Moreover, we perceive no Hudson issues that are implicated here. Finally, because outside sources of revenue were fully reviewed and classified through the

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[13] The Charging Parties access to the Union's underlying books and records provides an opportunity to discover or explore possible discrepancies between the figures cited by, or calculated by, the MTA in its demand and its general ledger.

hearing process, there was no prejudice to the Charging Parties' by permitting the MTA to insure total costs in certain areas over the costs in the original demand.

We are not persuaded by the Charging Parties' argument that, by permitting NEA revenues or grants to be restored to the demand, they are being "double billed" by the MTA and the NEA. The Charging Parties argue that, it is possible that the NEA charged fee payers for its grants to the MTA, while the MTA now seeks to also charge for the same revenue. However, the record evidence does not indicate that non-members are being billed twice because no evidence concerning the NEA's expenditures has been introduced. Instead, the parties agreed that the NEA portion of the fee would be ten percentage points less than the MTA's final chargeable fee.

Commission precedent indicates that the chargeability of union expenditures should be examined at the point of expenditure. Brown and Chicopee Fire Fighters, 14 MLC at 1252, n.8. Accordingly, local grant monies originally deemed nonchargeable are appropriately removed from the MTA agency fee equation. By determining that local support costs should be demonstrated at the local hearings, we recognize that, in this instance, we may effectively be raising the MTA fee, but we leave open the possibility of recovery of some of the money at the local hearings.

Finally, we concur with the hearing officer's recommendation that the MTA be permitted to restore revenues from non-union sources. In contrast to union expenditures, whose chargeability must be determined at some point, outside revenues should be considered here be-

cause they are overall assets available to the MTA, and provide a complete picture of the MTA's finances.

Contrary to the Charging Parties' assertions, our May 11, 1993 Ruling does not preclude a union from ever varying from a dollar figure delineated in its demand. Instead, our prior ruling notes that unions are not required to "calculate the fee which they demand be paid by fee payers with absolute precision at the time of the demand." Implicit in the Ruling is the notion of good faith mistakes in calculating the fee. Instead of prohibiting any variation from a demand, our ruling only acknowledged that variations create "a potential for prejudice that, depending on the circumstances of the case, might not be cured by permitting the fee payers ample time to prepare their rebuttal of the union's evidence." Therefore, our Ruling held that the MTA could not seek to charge for an extensive Legal Services program originally deemed nonchargeable, where discovery had not been undertaken, and where the Union had represented, at hearing, that it was not seeking to charge for the program.

Because we are persuaded that the Charging Parties would be unduly prejudiced by their consideration at this time, we will preclude the MTA from seeking to charge for costs in Communications program 1.4, Communications program 2.2, and Research program 1.2. In addition, as we more fully detail, infra, we will not permit the MTA to charge for the Communications Division Administration Program, 2.3.

We now review the parties' significant chargeability challenges by MTA Division. As previously indicated, unless otherwise detailed below, we adopt the findings of fact and recommended conclusions contained in the Recommended Decision.

Division of Affiliate Service

The Charging Parties argue that the MTA's Affiliate Services Division was the heart of the MTA's political machine. In support of their argument, the Charging Parties objected to the finding that "reenergizing local leaders was a priority." However, virtually all regional managers decried the lack of energetic leadership at the local level during their testimony. Therefore, compensating for the weak local leadership significantly burdened the Affiliate Service field staff.

The record reflects that there were collective bargaining difficulties encountered during the year in question, including the profound effect of the economic recession, the emergence of health insurance coverage as a significant and complex bargaining issue, and the protracted nature of the difficult negotiations; none of which are challenged. The MTA's quarterly division reports, even during the period of the Union's Question-3 campaign, confirm that field staff were enmeshed in contract or mid-term negotiations, grievance filing and processing, lay-off and other budget cutting disputes, and a myriad of other representational responsibilities. The Charging Parties' contention that the Question-3 campaign took priority over the division's collective bargaining activities is not supported by the weight of credited record evidence.

It is uncontroverted that Affiliate Services Director Bonazzi was responsible for coordinating the Union's Question-3 campaign. There is also no dispute that the Affiliate Services field staff performed campaign functions. However, the Charging Parties challenge the findings that the field staff had a finite campaign role and that the division's campaign activities consisted primarily of the

actions of Bonazzi, his meetings with a few others and some larger scale meetings. Despite the Charging Parties' continued objections to the contrary, the credited testimony from sequestered witnesses subject to extensive cross-examination reveals that Bonazzi's paper production and campaign enthusiasm out-stripped the field staff's political involvement. Therefore, the hearing officer's credibility determinations are entitled to substantial deference, and we decline to disturb them. See, e.g., United Water & Sewer Workers Local 1 v. Labor Relations Commission, 28 Mass. App. Ct. 359, 360 (1990).

Nonetheless, the Charging Parties continue to argue that it is simply not credible that field staff felt free to disregard Bonazzi's campaign wishes. Logically, according to the Charging Parties' apparent theory, the Affiliate Services field staff must have been engaging in immense amounts of political activity, about which all of the sequestered witnesses lied. However, no contemporaneous time sheet notations hint at any secret campaign activity. Further, we find no pattern of deception from our review of the time sheets. No trace of secret campaign activity has been noted in the thousands of submitted exhibits. No hint of a covert Affiliate Services field staff campaign is present in the testimony. To the contrary, all of the record evidence supports a finding that the Affiliate Service field staff played a limited role in the MTA's political activity.

The field staff's political activity was isolated and enumerated by Janet Strecker, whose affidavit forms a basis for the adjustments for misallocated nonchargeable time undertaken in the Recommended Decision. We find that, on this record, the MTA met its burden of persuasion that its political time and activities can be isolated and

segregated. We are persuaded that Strecker's testimony, including the charts contained in her affidavit, contain a reasonable, good faith ledger of the Affiliate Service staffs' primary political activities.

The hearing officer, who had the full and protracted opportunity to observe Janet Strecker's manner and demeanor, found her testimony credible and persuasive, and that finding is entitled to substantial deference. United Water & Sewer Workers Local 1 at 360. Further, we do not find that the evidence identified by the Charging Parties dictates a contrary result.

We are not persuaded that the Office of Campaign and Finance reports filed by the MTA materially undermine Strecker's credibility. We reject the Charging Parties' assertion that the filed reports are proof positive that the MTA has "cooked its books" because that claim is not supported by the credited evidence. The Charging Parties' concern is that political hours attributed to MTA employees in the campaign forms do not comport with the time sheet totals. Only a portion of the MTA's employees keep time sheets. The hours of administrative and support staff, who do not keep time sheets, are included in the campaign form totals. Therefore, by their very nature, the campaign reports would be expected to lead to different political activity time totals than the time sheets. Moreover, our independent review indicates that the time records kept by the MTA staff recorded more political or other nonchargeable hours on their time sheets than they recorded on the campaign finance forms. Therefore, the Charging Parties' suggestion that the MTA disclosed its full range of Question-3 activity to comply with campaign finance laws, but engaged in a cover-up of that activity for agency fee purposes, is not supported by the record.

Next, the Charging Parties contend that the political activities conceded by the MTA in Strecker's affidavit and supplemented in the Recommended Decision, are grossly underinclusive. Instead, in Appendix D to their Challenges to the Recommended Decision, the Charging Parties' propound their view of the political time that should have been excluded from the MTA's chargeable costs. We are not persuaded, however, that Appendix D has probative value.

We reject the notion, implicit in the listing of events in Appendix D, that any gathering at which a nonchargeable topic is referenced becomes a fully nonchargeable event.[14] For example, the Charging Parties, include TASC meetings, staff meetings, and management meetings in their proposed list of nonchargeable events. However, the record evidence discloses that the political content of any TASC meeting was incidental to its overall function. We also find that the staff and management meetings the Charging Parties reference in Appendix D were chargeable because the overriding purpose of those meetings was related to the overall mission of the MTA as bargaining representative.

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[14] The Charging Parties rely on Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 633-34 (1st Cir. 1990) for the proposition that activities or expenditures that involve both chargeable and nonchargeable matters must be considered wholly nonchargeable. In dicta, that court observed: "[W]here the permissible and impermissible are intertwined beyond separation, the objector should be entitled to a full rebate for the cost of the function." This hypothesis is not inconsistent with our approach: whenever chargeable and nonchargeable costs may reasonably be separated, the costs, attributable to nonchargeable activity will be deleted from the otherwise chargeable costs.

Moreover, we are not persuaded of the accuracy of the items detailed in Appendix D. The Charging Parties contend that a graphic example of the Recommended Decision's failure to identify and account for all MTA political activity is the asserted failure to deduct staff time for a Question-3 campaign staff appreciation luncheon held in Boston on November 28, 1990. Appendix D lists a limited and disparate group of Affiliate Service staff members the Charging Parties' Union attended the luncheon. For the afternoon in question, however, alleged attendee J. Reilly's time sheets reflect five hours of negotiation and Commission activity performed in Boston on behalf of the Sandwich local association. Two other alleged attendees were higher education staff members E. Suarez and Manager Tony Ross, whose routine work site is at the MTA's Boston headquarters. For the afternoon in question, Suarez recorded six hours of contract maintenance and grievance processing activity involving the Massachusetts Society of Professors and the Massachusetts Community College Council on her time sheets, while Ross recorded six afternoon hours to the higher education special constituency group. Except for the time sheets, we find no other evidence indicating the activities or whereabouts of employees Ross, Suarez and Reilly for the afternoon of November 28, 1990. Therefore, the evidence does not demonstrate that the cited individuals were at a staff luncheon at the Boston Holiday Inn. Instead, an inference arises that the November 28 luncheon entry in Charging Parties' Appendix D recounts nothing more than a list of MTA field staff employees who happened to be working in Boston on the afternoon in question.

The unreliability of Appendix D is further illustrated by exploring the second entry in the "miscoded hours" chart, Appendix D, Tab B, concerning the staff crisis team. Strecker's chart details the July 17, 1990 staff crisis team's meeting as a political activity and attending staff members' time was duly isolated and detailed. Costs attributable to that meeting were deleted from chargeable costs in the Recommended Decision. However, the Charging Parties assert that the failure to deduct the value of 2.5 hours of employee Devlin's time was in error because an internal MTA memo indicates that he was invited to the meeting. However, Devlin's time sheet reveals that he was working in the MTA's Northeast Regional office during the time in question, not attending the meeting in the Central Regional office in Auburn. Therefore, we find that the information contained in Appendix D does little to answer our inquiry into the Union's chargeable costs.

Finally, the Charging Parties challenge the hearing officer's calculation of misallocated political costs within the Affiliate Service Division. We have reviewed the hearing officer's calculations in the Recommended Decision and have determined that they are based on the comprehensive Strecker affidavit and charts, supplemented by her independent review of employees' time sheets. We are satisfied that the calculations are sound and reasonable.

We reject the Charging Parties' assertion that the Commission should be bound by the figures and calculations proffered by the MTA in its post-hearing brief. Contrary to the Charging Parties' position, the MTA's post-hearing calculations are not admissions. Instead, any admission made by the MTA is contained in Strecker's affidavit and the related testimonial and documentary

evidence. Moreover, although the Charging Parties object to the hearing officer's $1,870 variance from the MTA's figures in the Affiliate Services program 1-4 totals, we note that the variance from the MTA's calculations in program 5 by $4,968 is, in this instance, to the Charging Parties' benefit.

We now examine significant objections to individual chargeability recommendations within the Affiliate Services program areas. Under program 1.3, the Charging Parties assert that "Beat CLT Day" time was inconsistently treated by deleting instructors' time but permitting time charges for staff either attending the course or the Williamstown conference in general. Adopting the Charging Parties' suggestion, that all staff time during "Beat CLT Day" be considered nonchargeable, is unwarranted. The record suggests that, except for the designated presenters, only one staff member signed in for the Beat CLT seminars and there is no evidence about how long that person stayed. The record also demonstrates that the central purpose of the Williamstown conference was to discuss matters related to collective bargaining matters. Moreover, the record is clear that the Williamstown conference is an annual event attended by the majority of MTA staff. Therefore, attendance at that conference was not an additional Question-3 campaign expense. Therefore, unlike the designated presenters, the weight of the evidence shows that no staff members attending the Williamstown conference spent an identifiable amount of time at the Beat CLT seminars, rather than other legitimately chargeable activities. Accordingly, deleting the time and costs for presenters at Beat CLT seminars but including other time for other staff at the Williamstown conference that day as a chargeable confer-

ence expense, is a fair and reasonable estimate of the day's chargeable/nonchargeable activities.

Both the Charging Parties and the MTA lodge objections to the hearing officer's program 1.4 recommendations. First, the MTA challenges the recommended conclusion that the meetings of the Statewide Crisis Committee concerning a state-wide strike are nonchargeable. The MTA argues that an internal union debate about the desirability of a state-wide strike, involving no actual strike preparation, does not reach the point of implicating M.G.L. c. 150E, Section 9A. Therefore, the meetings are lawful, and chargeable, concerted activity.

However, because strikes by public employees are prohibited by Section 9A, we conclude that discussion about the desirability of a state-wide strike is not a legitimate activity undertaken in furtherance of the MTA's collective bargaining agreement. Therefore, we find that the discussion about potential strike activity are not germane to collective bargaining within the meaning of Lehnert. Therefore, we also reject the MTA's companion argument that the $2,657 travel costs of NEA-affiliated personnel who came to the June Affiliate Service Retreat for the sole purpose of discussing their state's experiences with state-wide strikes should be chargeable.

Contrary to the Charging Parties' contentions, however, we do not find that the hearing officer improperly deleted the speakers' travel costs while permitting charges for staff time at the Affiliate Service Retreat. There is no indication that the MTA incurred any additional costs or expenses due to its staffs' presence at the strike-related presentation because the record demonstrates that the staff would have been present at the Annual Retreat and

incurred substantially the same charges and costs, regardless of the isolated strike presentation. Overall, the record demonstrates the chargeable nature and purpose of the retreat. The hearing officer credited testimony concerning the multi-faceted chargeable benefits of such a gathering, including the opportunity for professional interchange with similarly situated colleagues, and we decline to disturb that credibility finding. See, United Water & Sewer Workers Local 1. Therefore, deleting the additional costs for the presenters' travel, while permitting charges for staff time, is a fair and reasonable chargeable/nonchargeable allocation for a portion of the overall chargeable Affiliate Services Retreat activity.[15]

Under program 1.4, the MTA also challenges the conclusion that April 17 and 18, 1991 activity at the University of Massachusetts was nonchargeable as an unlawful withholding of services, arguing that, with the employer's consent, routine activities were not expected on those days. Regardless of whether the activities constituted a withholding of services, they were public relations exercises designed primarily to influence the higher education budget within the political process.

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[15] An amount hearing of this magnitude necessarily involves drawing lines. As the courts have recognized, that process is imprecise. Sound labor policy and the Hudson requirement for a reasonably prompt decision sometimes require the use of reasonable estimates, fair approximations and, on occasion, a common sense approach. Otherwise, the process will be mired in accounting minutia and technicalities: an audit by litigation approach that will overburden the Commission and the courts, while unnecessarily delaying the fair adjudication of the rights being raised by the agency fee objectors.

Therefore, we find that related staff activity is nonchargeable.

However, we reject the Charging Parties' assertions that Lehnert prohibits charges for virtually all forms of informational picketing and we decline to adjust charges for other higher education informational picketing activity. We have consistently recognized that informational picketing in furtherance of a union's bargaining position, is an activity protected by Section 2 of the Law, City of Fitchburg, 2 MLC 1123 (1975), and, absent evidence that picketing is for general political purposes, we find it to be permissible.

We also decline to disturb the hearing officer's conclusions concerning the September 25, 1990 Worcester protest march. The record fully supports the finding that the march was a method of communicating a position concerning local working conditions; namely, an effort to avert immediate lay-offs. The pay voucher of the relevant MTA employee provides no support for the contention that the march was in any way related to the Question-3 campaign. The voucher clearly delineates three separate activities on the date in question, including the march, anti-CLT work, and a Worcester City Council meeting.

The Charging Parties assert that Lehnert prohibits the charging of activities concerning the Commission under Affiliate Services 1.5 because litigation must be brought "on behalf of" a bargaining unit to be chargeable. Lehnert indicates that "litigation that does not concern the dissenting employees' bargaining unit" is nonchargeable. Lehnert, 500 U.S. at 528. In this, Lehnert appears to follow the United States Supreme Court's instruction in Ellis v. Railway Clerks, 466 U.S. 435 (1984) that "litigation before agencies or courts that concerns bargaining unit employees" was chargeable, and "litigation not

having such a connection with the bargaining unit" was not. Ellis, 466 U.S. at 453. Moreover, the nonchargeable litigation referred to in Ellis and Lehnert, including employment discrimination, bankruptcy actions, and a challenge to the airline industry's mutual aid pacts, is markedly different from Commission proceedings. Because resorting to the Commission's proceedings is an essential extension of the collective bargaining process, and is analogous to grievance processing, a union's activities at the Commission must be chargeable.

The Charging Parties file numerous objections to the chargeability assessments involving program 1.0 direct costs. However, we find that the record supports the recommended charges for all items and the recommendations are adopted.

The MTA, on the other hand, contends that expenses concerning the Salisbury override campaign should be fully chargeable. The MTA does not challenge the standard recommended when reviewing override campaigns: that, to be chargeable, the revenues generated by an override must necessarily be committed to funding extant collective bargaining agreements. Instead, the Union argues that the standard is met in the Salisbury situation.

The record demonstrates that the Salisbury override was initiated exclusively for the purpose of rehiring teachers who had been laid off in mid-year and mid-contract. The record further demonstrates that all override revenues were used to restore teaching positions. Although, apparently by agreement, the override revenues were used to restore school funds, they flowed into the general municipal budget and were not necessarily committed to benefit the school contract. Accordingly, the Salisbury override costs are nonchargeable.

Under program 3.3, the Charging Parties assert that employee Pippo's computer literacy training, in the total amount of $1,251, must be proportionally charged, due to his current role as a union organizer. The Charging Parties appear to argue that Pippo's ideologically neutral computer literacy training is not fully chargeable because the acquired skill may be used for nonchargeable organizing activity. We reject this speculative and unworkable "ultimate use" test. The record reveals the MTA's overall on-going emphasis in field staff computer literacy, as well as its attempt to create a collective bargaining database and contract retrieval system. Further, as the hearing officer correctly noted, the record indicates that Pippo performs routine field representative functions, including crisis activities and grievance arbitrations.

The MTA concurs with the Charging Parties that the chargeability of the MTA's grant of a salary to the President of the USA local, a program 3.0 direct cost, is difficult to assess on this record. However, we do not adopt the Charging Parties' further contention that the grant is fully nonchargeable. Instead, consistent with the treatment of other grant items to local associations, the grant is more appropriately analyzed at the local hearing. The $16,310 expenses, like other local support items, will be removed from consideration in this proceeding.

The MTA objects to the hearing officer's recommendation concerning the program 3.0 direct cost for a UMass flyer. However, we concur with her conclusion that the flyer runs afoul of Lehnert's prohibition against charging for general public relations costs that are not germane to collective bargaining.

In addition to their overall objections to the deletion of misallocated political time, the Charging Parties

contend that, under program 4.1, misallocated political time cannot be deleted, because the higher education manager indicated that higher education staff used programs 4.1 and 4.2 interchangeably. However, misallocations to 4.1 and 4.2 were tracked and corrected in the Recommended Decision, in accord with the information contained in Strecker's affidavits. The record does not suggest that further reductions in the chargeability of higher education staff time are warranted.

The Charging Parties file several objections to the divisional management and administrative program. First, the recommendation that TASC meetings be considered fully chargeable is challenged. However, the record, supports the hearing officer's findings concerning the nature, role and purpose of the meetings. Therefore, we find that any political content is incidental to the TASC's overall representational function. As the MTA correctly notes, of the over two hundred agenda items covered by the 1990-91 TASC meetings, less than twenty concerned political topics.

Finally, the Charging Parties challenge the recommendation that program 5.0 costs be apportioned according to the division's overall chargeable/nonchargeable costs. The apportionment of administrative or management expenses is consistent with the Commission precedent articulated in Newton I, 13 MLC 1589, 1596 (1987) and Brown and Chicopee Fire Fighters, 14 MLC 1241, 1253 (1987). Divisional management costs are proportionally charged due to the reasonable presumption that management and administrative costs correspond to, and are reflective of, the activities undertaken by a division as a whole. Here, the Charging Parties called into question the presumption of proportional chargeability of Affiliate

Services program 5.0 and argued that Affiliate Services' management costs were not reflective of the division's overall activities. The evidence adduced concerning Bonazzi's Question-3 campaign involvement and his time sheet errors in the early stages of the campaign suggested that his management costs may contain a disproportionate level of political activity. Therefore, the costs of Bonazzi's and the regional managers' political meeting involvement, originally allocated to program 5.0, were deleted from the management program cost total, before the remainder was proportionally charged. We endorse and adopt the hearing officer's recommendation in this regard.

We specifically reject the Charging Parties' contention that the proportional charge for program 5.0 is flawed because of Bonazzi's asserted further political activity. The nature of a proportional administrative charge assumes a degree of political or otherwise nonchargeable activity, and the program is proportionally chargeable because of that activity, not despite it. The costs of the exclusively, and arguably disproportionate, political activity, originally misallocated to the division's management program, as identified in Strecker's reliable affidavit, have been deducted from program 5.0 costs. The remaining program 5.0 costs are further reduced by 22.4%, to reflect the division's overall chargeable/nonchargeable ratio, thereby protecting the non-members' rights and interests.[16]

The Charging Parties' contention that the Affiliate Services divisional management program was uniquely treated is correct. We concur with the hearing officer that

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[16] This figure is unaffected by the deletion of the $16,310 grant to the USA local from the division's overall and chargeable cost totals.

only in Affiliate Services was disproportionate political or other nonchargeable activity arguably demonstrated. Therefore, in Affiliate Services, isolated political costs were deducted before the management and administrative costs were apportioned.

MODIFIED TOTAL COSTS OF AFFILIATE SERVICES	$5,613,075
MODIFIED CHARGEABLE COSTS OF AFFILIATE SERVICES	$4,500,950

Division of Legal Services

At the outset of their objections to the recommendations concerning the Legal Services Division, the Charging Parties renew their Motion for Sanctions due to the MTA's asserted dilatory discovery tactics. The Commission has previously considered the Motion, indicating that the MTA had complied with Rule 17.13 by having legal service materials available for review. Because we find that the MTA complied with Rule 17.13, the Charging Parties request that the evidence relating to divisional programs 2 and 3 be excluded is not warranted. Therefore, the renewed Motion is denied.

The Charging Parties contend, that, under program 2.1 MTA management meetings are largely political and nonchargeable and that General Counsel Clarke's meeting attendance costs must be excised from the chargeable totals. After an independent review of the totality of the management meeting agendas in the record, we find that political discussion is incidental to the overall purpose and function of the meetings. The evidence does not support the Charging Parties' perspective that political activity was either a chief or primary component of the MTA's management meetings.

The Charging Parties' further suggestion that managers be required to segregate their time into chargeable and nonchargeable categories, topic by topic, minute by minute, during every meeting, is unwarranted and unworkable. The level of detail urged by the Charging Parties could adversely affect the conduct of the Union's representational work by giving rise to endless debate about the chargeability and exact duration of each meeting discussion topic.

We find that Clarke's legal updates to MTA staff and local Union Presidents are fully chargeable. The updates are largely neutral presentations of current legal developments, including descriptions of legislative enactments and court cases affecting the collective bargaining and educational environment. We concur with the MTA that the allegedly nonchargeable political update cited by the Charging Parties, a memo advising staff and elected Union leaders of the federal legislation extending FICA taxes to public employees, provides advice to Union representatives about a possible area of future impact bargaining.

The Charging Parties object to charging for agency service fee litigation for two reasons: 1) it is considered nonchargeable extra-unit litigation; and 2) nonmembers should not be required to subsidize arbitrary and excessive demands. Extra-unit litigation, as defined in the Lehnert and Ellis decisions, was not at issue here, because program 1.0 activities, including the representation of individual educators, were not considered. We regard agency service fee litigation to be part of union governance/contract administration, which is analogous to processing grievances. Therefore, because agency service fee litigation involves pursuing collective bargaining rights as the exclusive bargaining representative, we believe it is

fully chargeable. Moreover, the MTA and NEA portion of any fee affects all MTA bargaining units. Finally, the record does not support that Charging Parties' contention that the Union's fee demand here was arbitrary. In the first full-dress, state-wide amount hearing, the MTA successfully demonstrated that over 80% of its assessed fee was chargeable.

The recommendation that Clarke's two hours of activity at a Health Care for All conference is chargeable is challenged by the Charging Parties because the gathering was sponsored by a political advocacy group. The record demonstrates that health insurance was a paramount and on-going collective bargaining concerning during the year in question. In addition, as General Counsel, Clarke supervised related Commission litigation, including litigation concerning health care coverage. See, e.g., Board of Regents, 19 MLC 1248 (1992). In this context, we permit the limited charge for the General Counsel's health care conference attendance.

Despite the Charging Parties' objection, we find that Clarke's work on behalf of the higher education bargaining units is chargeable. The Charging Parties assert that the record is devoid of evidence that Clarke's work in the higher education arena related to funding or ratifying a specific, previously-negotiated contract. However, Clarke's testimony indicates that she attended the Higher Education Conference to speak about the governor's refusal to fund the newly negotiated collective bargaining agreement. The MTA's response to the ongoing refusal to fund the contract is chargeable lobbying performed in the limited context of contract ratification or implementation. Lehnert, 500 U.S. at 522.

The MTA objects to the recommendation that staff time spent successfully representing the MTA in connection with a strike petition filed by the Winchester School Committee is nonchargeable. We concur and, absent a finding that the MTA engaged in unlawful conduct in violation of no strike prohibition in M.G.L. c.150E, §9A, we consider defending against an unwarranted strike petition to be chargeable activity. Accordingly, the $418 value of the expended staff time will be added to program 2.1 chargeable costs.

MODIFIED CHARGEABLE COSTS
OF LEGAL SERVICES $56,454[17]

Division of Communications

The MTA poses an overall objection to the analytical framework the hearing officer employed with respect to the MTA's publications. The hearing officer considered MTA TODAY to be a members-only benefit and declined to consider it chargeable under Commission Rule 17.04(1)(e). The MTA argues that, under Rule 17.04, its publication is a vital internal communication device, not merely a tangential benefit.

The record, however, does not support the MTA's contention that MTA TODAY is merely an internal union communication. Instead, the paper's circulation includes courtesy copies to some legislators, school committee members and Department of Education personnel. More fundamentally, the MTA stipulated that the publication is sent to members only. Nonmembers are being dou-

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[17] The chargeable/nonchargeable divisional percentage, 3.5%, is unaffected by the addition of $418 in chargeable costs in program 2.1. Therefore, the chargeable costs in program 3.0 are unchanged.

ble-billed for the publication, by being assessed an agency fee for its production and by being charged a surcharge for its distribution. See, Dolan and East St. Louis Federation of Teachers, 10 PERI 1078 (1992). Compare Lehnert, 643 F. Supp. 1306, 1328 (W.D. Mich. 1986) aff'd, 881 F.21 1388, 1392 (6th Cir. 1989), aff'd in part 500 U.S. 517 (1991) (union publication available to all unit members chargeable to the extent it chronicles chargeable activity.) Therefore, because we conclude that the MTA TODAY is a nonchargeable members-only benefit, we need not review any individual articles.

The MTA also objects to the nonchargeable designation of several articles in Frontline, the internal union leadership publication. Having reviewed the challenges and the articles, we conclude that the record supports finding the Washington State strike article, the "Controlling the Crisis" segment and the Communications Ideas promotional piece are nonchargeable.

The Charging Parties challenge the hearing officer's assessment of the chargeability of program 1.6, Internal Communications/Division Support, arguing that Manager Wollmer's testimony concerning his staffs' activities should be excluded from the record. As in other divisions, the divisional manager was permitted to provide evidence concerning the nature of the division's activities and the staffs' corresponding role. We overrule the Charging Parties' renewed hearsay and best evidence objections to Wollmer's testimony. The hearing officer found Manager Wollmer's testimony credible, and we will defer to that finding. United Water & Sewer Workers Local 1 at 359. The hearing officer also reviewed Wollmer's chargeable time designations and calculations in conjunction with relevant time sheets and, in certain instances, modified

Wollmer's calculations.[18] We have reviewed the hearing officer's chargeable time recommendations, and we adopt them in their entirety. As a result, approximately 23% of hours and expenses originally allocated to program 1.6 are being charged to nonmembers.

The Charging Parties challenge the chargeability of staff member Polidori's higher education assignments. The record reveals Wollmer's testimony that Polidori assisted higher education locals with their collective bargaining situation and their furloughs. Polidori's contemporaneous time sheets are in accord with Wollmer's recollections. It is beyond dispute that higher education personnel were furloughed. See Massachusetts Community College Council v. Commonwealth, 420 Mass. 126, 130 (1995). The Charging Parties' repeated claims that Polidori was working full-time on the "Question 3" campaign does not comport with the credited testimonial and documentary evidence.

Clear and substantial record evidence supports finding that Polidori was involved with the legislature in connection with the higher education contracts. The Charging Parties assert that Polidori's time in this regard is nonchargeable because the legislature failed to vote on specific funding for a collective bargaining agreement. The legislatures's failure to act on the newly-negotiated contracts was precisely the issue, and the successor

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[18] We note that numerous hours of chargeable activity, not so designated by Wollmer, were revealed during the hearing officer's review. See, e.g., Recommended Decision, n. 67. Where Wollmer's chargeable designations were overinclusive, the nonmembers' rights were protected by the deletion of the nonchargeable hours. However, the hearing officer declined to add chargeable costs revealed during her independent review.

agreements remained unfunded. See, e.g. Alliance, AFSCME/SEIU v. Secretary of Administration, 413 Mass. 377 (1992). Finally, we concur with the manner in which the Recommended Decision identifies the segregated and deleted the value of Polidori's nonchargeable work on the Weld budget issue.

The Charging Parties' final Communication Division objection concerns program 2.3. The Charging Parties correctly note that the program, which includes, among other things, division management and other administrative activities, was originally deemed nonchargeable in the MTA's demand. Outside of the Union's post-hearing brief, we find no indication that the Charging Parties received notice of the MTA's intention to charge for the program. By proportionally charging the program, the hearing officer treated it in a manner consistent with all other division management and administrative expenses. However, we conclude that, under these circumstances, program 2.3 will be entirely nonchargeable. The $8,881 program 2.3 total, representing 5% of the program's overall costs, will be deducted from the division's chargeable total.

MODIFIED CHARGEABLE COSTS OF PROGRAM 2.3	$0
MODIFIED CHARGEABLE COSTS OF COMMUNICATIONS	$33,529

Division of Professional Development

The standard recommended by the hearing officer for assessing the chargeability of professional development activities was whether activities related to improving the working conditions or improving the professional competence of members or represented bargaining units. The

Charging Parties object to the hearing officer's calculations in this Division on the ground that activities broadly relating to improving the profession in general were deemed chargeable. However, we find that the standard was not applied as broadly as the charging parties contend. Rather, the hearing officer determined chargeability based on whether the professional development activities at issue improved the working conditions or professional skills of the particular teachers represented by the MTA. See, e.g., Antry v. Illinois Educational Labor Relations Board, 552 N.E.2d 313, 348.

The Charging Parties argue that the costs of a special education survey should be nonchargeable because the survey was ultimately used in connection with the political process. Unlike the charging parties, we do not believe that the chargeability of the questionnaire should turn on how the results may ultimately be used but whether it was designed to elicit information about working conditions. In our view, therefore, questionnaires of the kind at issue here are chargeable when they are used to determine the needs of the employees in the bargaining unit, although any subsequent political activity relying on that kind of questionnaire may ultimately be nonchargeable at the time it is used for political purposes. Here, the internal union survey comprehensively questioned special educators about their working conditions and was fully chargeable.[19] Further, Todd's legislative testimony concerning special education matters was appropriately considered nonchargeable. Accordingly, we conclude that the cost of surveys conducted to research or

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[19] We express no opinion as to any program that might be developed as a result of the answers to the survey.

ascertain the professional development interests or needs of bargaining unit members are chargeable.

The MTA objects to the recommendation that certain credit courses sponsored by the division are nonchargeable. The record reflects that a nonmembers' surcharge was advertised in connection with certain professional development course offerings. The surcharge indicates that, at least to some extent, the MTA is seeking to double-charge nonmembers for the course offerings, rendering them nonchargeable.

Relying upon excerpts of Manager Andelman's testimony and an aspect of an internal memo, the Charging Parties argue that workshops sponsored by the division are nonchargeable members only benefits. However, the internal report relied upon by the Charging Parties does not contradict the totality of Andelman's testimony. We conclude that the finding that workshops are inclusive, rather than exclusive, is supported by the record.

Under program 4.1, the Charging Parties object to charges for staff support to MTA designees to the Massachusetts Board of Education and to the Massachusetts Advisory Commission on Educational Personnel, a body considering teacher preparation and certification. The MTA has seats on the boards due to its role as a bargaining representative for educational personnel. The MTA's costs are chargeable because the bodies' subject matter affect bargaining unit members' terms and conditions of employment, thereby implicating the Union's representational responsibilities. The Charging Parties' objection, that the record does not establish that the MTA is an exclusive representative to anyone, overlooks the MTA's uncontested affiliation and unified dues structure.

Moreover, the Charging Parties have posed no objection to the initial recommended finding: The MTA is a public employee organization that represented 60,276 full-time equivalent employees of municipal and regional school systems and the Massachusetts higher education system. Recommended Decision, at p. 12.

Objections are also lodged to charges for activity relating to the Joint Task Force on Teacher Preparation because the entity the Charging Parties consider it an advisory body concerned with education reform. However, it is uncontested that the task force proposal on teacher certification would have statewide effect on bargaining unit employees' working conditions. Therefore, the record supports finding a sufficient nexus between the task force and the MTA's representational role to permit charges for its oversight.

The Charging Parties maintain that the development of "issues papers" addressing major and/or topical educational issues are nonchargeable because they concern issues in play in the legislative process. The record, however, supports finding that the papers were internal discussion pieces, developed to familiarize staff and Union leaders with aspects of educational policy debate. In addition, the credited testimony reveals that the papers were related to enhancing the representatives' collective bargaining skills.

In their challenges, the Charging Parties seem to suggest that the Commission is bound by any individual MTA employee's opinion about the chargeability of Union activities. The hearing officer considered the internal analysis of the Massachusetts Business Alliance for Education (MBAE) education reform proposal chargeable because the proposal dealt with matters affecting working

conditions and had collective bargaining implications, including certification requirements, job security, tenure and seniority. The MTA's Director of Research, however, considered the MBAE proposal to be political. The Charging Parties seem to argue that his opinion is dispositive and that, as a consequence, the Professional Development Division's analysis of the proposal is nonchargeable. In our judgment, informed by our expertise in collective bargaining matters, the proposal has clear collective bargaining implications, rendering its internal analysis chargeable.

The Charging Parties assert that massive political activity occurred within program 6.3, while the MTA argues that the program should be fully chargeable. Program 6.3 contains only $3,742 in expenses, incurred for one joint local Union president and superintendents' conference. The record supports the finding that the joint conference had dual purposes and mixed content. The estimate that the conference is ½ chargeable, due to its informational aspects and its benefit to collective bargaining relationships, is reasonable and appropriate.[20]

Finally, the Charging Parties challenge proportionally charging the division's management, due to the manager's political activity. The record reveals that, as in other divisions, some of the management activities and related expenses would be considered nonchargeable, a fact

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[20] The Charging Parties challenge program 6.7 recommendations, arguing that charges relating to a school administrators' conference should have been reduced by one-half. However, the record demonstrates that the administrators' conference under 6.7 is separate and distinct from the program 6.3 joint conference.

assumed in the proportionally chargeable paradigm. However, the record does not establish disproportionate nonchargeable activity within program 7.0.

Accordingly, we make no modifications to the hearing officer's chargeability recommendations in the Professional Development Division.

Division of Research

The Charging Parties assert that the hearing officer erroneously credited the testimony of Research Manager Zollo, especially concerning his stated lack of interest, or involvement, in MTA political campaigns. However, we conclude that the hearing officer's Research Division findings fully comport with the record evidence, and we decline to disturb her determination concerning Zollo's credibility. United Water & Sewer Workers Local 1 at 359.

There is no basis for the Charging Parties' continuing claim that Research Employee Danning assisted in Proposition 2½ override efforts. The record reveals that the division answered questions about how Proposition 2½ worked and conducted sessions on how to interpret the financial profiles developed for the MTA Research Division by the Department of Revenue. The contention that the division held workshops on Proposition 2½ overrides is unfounded. Instead, the record supports the finding that divisional staff discussed the provisions of Proposition 2½ and the constraints that the law imposes on the collective bargaining process.

The Charging Parties also argue that the division management program should be nonchargeable, due to Zollo's asserted political activity. The record does not reflect that the political, or otherwise nonchargeable,

content of the management program was disproportional to the division's nonchargeable activity. Nonetheless, the hearing officer deducted the cost of Zollo's election day poll-watching activity from the management program before proportionally charging the remaining costs, and we concur with this approach.

We decline to make any adjustments to the recommended chargeability calculations for the Division of Research.

Division of Governance

We adopt the analytical approach and standards articulated and applied in the Recommended Decision concerning the MTA's governance expenses. To summarize: Activities that are necessary to a union's existence, which would take place whether or not the union engaged in nonchargeable activity, are presumptively chargeable. When considering any governance expense, the initial inquiry is whether the activity relates to sustaining, perpetuating or managing a union as an entity. If so, the activity is presumed to be chargeable, unless evidence reveals expenditures related to exclusively nonchargeable activity. See, e.g., Ellis, 466 U.S. at 448; Antry, 552 N.E. 2d at 344. Then, when possible, such exclusively nonchargeable expenses are isolated and deleted from the remaining costs.

With respect to union officers, a union must first establish by credible record evidence that its officers have roles in governing the organization or otherwise sustaining its existence as a collective bargaining representative. If that initial burden is met, union officers' costs are apportioned according to the union's overall chargeable

expenditures, unless either party overcomes the presumption by proving a different allocation in fact.

The Charging Parties argue that these standards are inconsistent with Commission and court precedent. However, the standards applied in the Recommended Decision, and affirmed here, are in accord with view of governance expenses detailed in Newton I, 13 MLC 1589 (1987). At that time, the Commission indicated:

> We will presume that overhead expenses necessary to maintain an organization's existence are permissible, provided the union has produced some evidence that the expense was incurred in connection with the union's function as a collective bargaining agent.
>
> It would be difficult, if not impossible, to determine whether or to what extent expenses are affected by the amount of impermissible activity undertaken by the union. Indeed, as the court recognized in Ellis, the union would presumably incur such expenses in essentially the same amount to operate at all... a charging party could rebut the presumption of permissibility only with evidence that the expenditure was actually incurred in furtherance of an exclusively impermissible activity. Newton I, 13 MLC at 1596.

The Charging Parties argue that Brown and Chicopee Fire Fighters, 14 MLC 1241 (1987), requires the MTA to demonstrate, on the basis of adequate time records, how much time was spent by each officer on chargeable activities. In the absence of officers' time sheets, they contend that the MTA is not entitled to any officers' fee.

In Brown and Chicopee Fire Fighters, however, the Commission indicated that the officers' salaries were proportionally chargeable expenses. The details of officers' time and expense allocations are largely irrelevant if the officers' salaries are truly proportionally charged. Therefore, the absence of detailed officers' activity and expense records, in this instance, is without consequence.

Therefore, we find that the governance standards have been applied appropriately when considering the Annual Meeting charges of program 1.1. Among other items, delegates at the MTA's Annual Meeting elect the MTA officers, Executive Committee and Board members, set the Union's budget and amend the Union's bylaws. Therefore, the vital expenses are presumptively chargeable. However, we concur with the hearing officer that the costs attributable to an exclusively nonchargeable fundraising event held in conjunction with the Annual Meeting must be deleted from the meetings' costs.

We decline to adopt the Charging Parties' view that the MTA is not entitled to any fee for its Annual Meeting due to a political press conference held at the meeting site. The record reveals, and the Recommended Decision correctly found, that MTA presidents customarily arrive at the annual meeting site on the Wednesday before the meeting's commencement. On Thursday, the date of the political press conference here, the uncontroverted evidence demonstrates that, as is customary, MTA President Bacon hosted intensive pre-convention governance meetings in her hotel room and incurred a related room service charge. Therefore, the record demonstrates that the hotel expenses challenged by the Charging Parties were a function of the annual meeting preparation, not the press conference.

The Charging Parties also contend that Ellis cannot be relied upon for the proposition that nonmembers may be charged for all union convention costs. In Ellis, the Supreme Court deemed the union's governance convention to be fully chargeable because "if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult members about overall bargaining goals and policy." Ellis, 466 U.S. at 488. In reaching that conclusion, the Ellis Court rejected the concern expressed by Justice Powell that the convention, considered fully chargeable by the court's majority, contained major addresses by prominent politicians. Therefore, the Ellis Court recognized that all convention costs are fully chargeable, even if they include some political or ideological speeches or other incidental actions. Therefore, the costs of the MTA's Annual Meeting are fully chargeable.

The Charging Parties contest the fee recommendations relating to Union Board and Executive Committee Meetings, due to the political discussions undertaken at various meetings. The record establishes that the Board and Executive Committee are the Union's governing bodies. The groups' minutes reveal their comprehensive participation in governing and perpetuating the Union as an entity. It is undisputed that political discussions also occurred during Board and Executive Committee meetings. We are persuaded, however, that the overall presumption of chargeable expenses was not rebutted. In accord with the hearing officer's recommendations, we delete certain direct expenses incurred by Board and

Executive Committee members with respect to exclusively nonchargeable activity.[21]

The Charging Parties object to proportionally allocating the MTA officers' salaries, based on the chargeable percentage of the MTA's overall costs, arguing that it is undisputed that the officers engaged in nonchargeable activity for the year in question. Again, a presumption of proportionality assumes nonchargeable activity within a union program or expense area. Therefore, the presumption is not rebutted merely by evidence of nonchargeable activity. Instead, the record must demonstrate disproportionate nonchargeable activity

Here, the MTA met its initial burden of establishing that its officers have a role in governing the organization.[22] On this record, the MTA officers' costs will be proportionally reduced by approximately 47%. The totality of the present record does not indicate that the officers' nonchargeable activity and expenses were disproportionate to the MTA's overall nonchargeable

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[21] The Charging Parties imply that the hearing officer overlooked the parties' stipulations to specific nonchargeable officers' expenses. However, the record contains no agreement concerning the chargeability of Executive Committee and Board member expenses. Instead, the parties entered stipulations concerning the amount of various expenses to reduce the duration of the cross-examination of the relevant MTA governance witness. The Recommended Decision indicates that the stipulated amount totals were subjected to the hearing officer's independent chargeability assessment. Therefore, the expenses pertaining to exclusively nonchargeable activity have been appropriately identified and the costs deleted.

[22] Contrary to the Charging Parties' assertion, the Union need not demonstrate that its officers have a direct role in helping a local with a collective bargaining problem.

endeavors and costs for the year in question. Therefore, we conclude that the officers' costs should be charged proportionally.

We accept the hearing officer's chargeability recommendations concerning the various MTA governance committees and councils. Although the hearing officer considered the Statewide Membership Committee nonchargeable, the Charging Parties assert that she erroneously and egregiously failed to account for and deduct the committee's expenses. No Statewide Membership Committee charges were deducted because, as indicated in the Recommended Decision, none were incurred during the year in question.[23] No Statewide Membership Committee entries are recorded in the MTA's general ledger. Moreover, it would be imprudent to conclude that charges for all of the policy councils should be forfeited because the hearing officer failed to isolate and delete the costs of the MTA's Statewide Membership Committee.

The Charging Parties challenge the recommendation that, with the exception of "Beat CLT Day," the Summer Leadership Conference is chargeable. Summer Leadership Conference activities are germane to collective bargaining functions and skills. The gathering also fosters an awareness of issues relating to the terms and conditions of employment of educational personnel. The hearing officer estimated the costs of "Beat CLT Day" to be one-fifth of the five day conference total, and that amount

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[23] The Statewide Membership Committee is absent from the list of policy committees that incurred expenses for the year in question. Recommended Decision, at p. 204.

was deleted from the total conference cost.[24] In addition, the hearing officer estimated the costs for other nonchargeable conference programs based on their percentage of a day's activities. Contrary to the Charging Parties' view, we find these approximations to be reasonable and well-founded. The remaining Summer Leadership costs are fully chargeable.

The Charging Parties object to considering the conference administration program, program 7.2, fully chargeable because some MTA conferences contained political content. The Charging Parties also appear to argue that program 7.2 should be treated like other divisional administrative program areas and proportionally charged. However, the record confirms that the MTA's conference administrator, whose costs are allocated to program 7.2, devotes most of her time to fully chargeable activities, including the Annual Meeting, the NEA convention and governance meetings. Therefore, we accept the recommendation that, after deleting the expense related to a nonchargeable Teachers Trust Fund activity, the remainder of program 7.2 is chargeable.

Finally, we reject the contention that the Governance Division Manager's admission to allocating approximately thirteen hours of political activity to the division's management and administrative program affects the program's proportional chargeability. The record reveals no sugges-

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[24] The MTA objects to the hearing officer's failure to use gross conference costs, including the cost of room and board, in this equation. We concur with the hearing officer that room and board costs are not true MTA costs for the event because conference attendees reimbursed the MTA for the charges.

tion that nonchargeable activity allocated to program 8.1 was disproportionate to that of the division as a whole.

Administration and Personnel/Building Operations

The Union produced evidence that certain expenses, including rent, insurance, building maintenance, audits and accounting, were incurred in connection with the Union's function as a collective bargaining agent. We find that the hearing officer's recommendation that the expenses are fully chargeable is in accord with Commission precedent. Newton I, 13 MLC at 1596. This prescription that overhead expenses are fully chargeable comports with the Ellis court's rationale that a union would presumably incur essentially the same expenses to operate at all. Ellis, 466 U.S. at 448. As we stated in Newton I: "It would be difficult, if not impossible, to determine whether or to what extent such expenses are affected by the amount of [nonchargeable] activity undertaken by the union." Newton I, 13 MLC at 1596. Therefore, we find that the MTA's overhead and administrative costs are fully chargeable.[25]

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[25] Recently, a case cited with approval by the hearing officer, Bromley v. Michigan Education Association, 843 F. Supp. 1147 (E.D.Mich. 1994), has been remanded to the District Court. After an opportunity for discovery, the District Court is to reconsider whether administrative costs, including, among other items, liability insurance, building renovations, and bill paying are properly treated as chargeable in their entirety or whether they should be allocated in proportion to the union's overall chargeable and nonchargeable activities. Bromley v. Michigan Education Association, 82 F. 3d. 686 (6th Cir. 1996). Here, however, the hearing followed extensive discovery, and the developed record reveals no factual basis for challenging the fully chargeable presumption, as applied, in Adminis-

The Charging Parties contend that only proven, discrete, chargeable expenses can be levied against them, and that no union expense or staff cost may be presumed to be either fully or proportionally chargeable. The Charging Parties would require, in all instances, specific proof of how much time employees spend on chargeable activity. Therefore, the Charging Parties challenge the assessment of proportional charges for Executive Director-Treasurer Sullivan arguing that, without specific proof about how he spent his time, his time and expenses are not chargeable.

The record establishes that Sullivan's responsibilities and activities reflected the activities of the MTA as a whole. Sullivan was the Union's chief financial and operating officer. His demonstrated job responsibilities and activities included, among other items, supervising and evaluating management staff, recommending the annual budget, monitoring the organization's finances, and providing information and advice to the MTA's officers, Board and Executive Committee. Sullivan was also involved in all staff employment decisions, he bargained with the internal staff union, and he was involved in property management matters. In addition, Sullivan was involved in nonchargeable activities, including supervising the Division of Governmental Relations' activities. In sum, Sullivan's role involved managing the entire MTA, and his activities mirrored the organization's endeavors. We are not persuaded, on this record, that Sullivan's political activity was disproportionate to the MTA's overall nonchargeable activity. Therefore, propor-

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trative and Personnel programs 2.0 and 3.0, Building Operations and Finance and Accounting.

tionally charging this management expense, based on the MTA's overall percentage of chargeable activity, is fair and appropriate.

The Charging Parties challenge the recommendations concerning the Building Operations Costs. Upon review of the Recommended Decision, we conclude that the charging parties are not unduly prejudiced by permitting the MTA to adjust its property management and building expenses from a proportionally chargeable to a fully chargeable basis. However, the Charging Parties correctly note that the Recommended Decisions's total property management figure is in error, and we reduce it to $64,070.[26]

We conclude that the hearing officer's recommendation that the percentage of building operational costs devoted to MTA space should be applied to overall property management charges incurred in program 2.0 is fair and reasonable. The appropriate calculations contained in the Recommended Decision, at p. 227-228, indicate that 85.4% of the overall building operational costs relate to MTA activities. Therefore, the total costs of program 2.0 will be reduced by 14.6%.

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[26] We note that the figure utilized by the hearing officer is identical to the one presented by the MTA in its post-hearing brief, not the figure found in the MTA's demand, MTA #1. However, we are not persuaded by the Charging Parties' claim, that the Union's brief was blindly adopted. Rather, we are satisfied that the costs identified by the hearing officer as chargeable are based on the record and not merely accepted as fact based on the MTA's brief. For example, the MTA asserted in its brief that is was entitled to 97% of the property management cost, but the hearing officer found that the amount reflected in the record was only 85.4%.

MODIFIED TOTAL COSTS OF PROGRAM 2.0	$ 64,070
x proportion of MTA only costs (85.4%)	
MODIFIED CHARGEABLE COSTS IN PROGRAM 2.0	$ 54,716
MODIFIED CHARGEABLE COSTS IN PROGRAMS 2.0 AND 3.0	$263,359

Division and Finance and Accounting

The record indicates that finance and accounting staff engaged in a total of approximately fourteen hours of nonchargeable activities during the year in question. Approximately two hours of staff time was devoted to administering the Professional Rights Fund, ten hours to administering the VOTE account, and two hours were spent in connection with the campaign reporting forms. In their challenges to the hearing officer's recommendations, the Charging Parties argue that due to this political activity, the MTA is entitled to no finance and accounting fee.[27] However, we regard the fourteen hours of activity here, in a division with a half a million dollar budget, as incidental and de minimis. Therefore, in accord with Commission precedent, we consider the finance and accounting expenses to be fully chargeable. See Newton I, 13 MLC at 1596; Brown and Chicopee Fire Fighters, 14 MLC at 1253, n.9.

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[27] In their post-hearing brief, however, the Charging Parties argued that the division was chargeable in proportion to the MTA's overall chargeable activity. Charging Parties' Brief, Vol. III, p. 175.

Printing and Mailing

The Charging Parties assert that the hearing officer erroneously failed to account for and offset the income from print jobs the MTA performed for outside organizations. To obtain a complete picture of the MTA's overall costs for the year in question, we have consistently permitted outside revenues to be restored to other budget program areas. Therefore, we find the Charging Parties' objection to be without merit.

We are not persuaded by the Charging Parties' further argument, that the MTA should forfeit its printing and mailing fee due to its in kind printing campaign donations. As stated in the Recommended Decision, a total printing and mailing contribution valued at $9,564.65 was disclosed in the MTA's campaign finance forms. The amount of the contribution from the program budget was deleted and the remaining costs were charged in proportion to the MTA's overall chargeable activity. We endorse this approach and accept the recommended printing and mailing fee amount.

Objections to Final Calculations

The Charging Parties challenge three aspects of the final calculations contained in the Recommended Decision. First, they object to designating the majority of governance costs as service items, to be used in the calculation of the overall percentage of MTA chargeable activity, rather than as administrative costs. However, we conclude that, to provide a fair percentage of the Union's overall chargeable costs, the majority of activities of the Governance Division are appropriately grouped with other service divisions. The nature and substance of the division's activities are not akin to those found in the adminis-

trative divisions, like printing and mailing or telephone and supplies. Instead, governance activities clearly influence the chargeability of the administrative or support groups, such as word and data processing, or printing and mailing. Next, the Charging Parties contend that, although the Commission has indicated that there are two acceptable methods of calculating an agency fee, when both methods are available, the objecting fee-payers' constitutional interests require the Commission to charge the nonmembers the lower amount. However, we find no support for this proposition. In Woburn Teachers' Association we indicated that: "[t]he MTA could divide its total permissible expenditures by the number of employees represented by the MTA to determine the portion of the fee payable to the MTA." Woburn Teachers' Association, 13 MLC 1555, 1564 (1987). The hearing officer's fee calculation comports with this methodology and will be adopted.

Finally, the Charging Parties criticize the hearing officer's use of the MTA's full-time equivalent figure in the fee calculation. The record reveals that the MTA represents in excess of 69,000 individuals, some of whom pay less than full dues or agency fees. For example, the MTA represents part-time employees, clerical employees and bus drivers. The number of represented individuals is translated into a full-time equivalent number, a number used by the MTA in its internal calculation of its share of dues and its agency fee.[28] It is reasonable and appropriate

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[28] The contention that the MTA used a larger number of employees in its original fee calculation is not supported by this record.

to use a full-time equivalent figure to calculate the per capita cost for nonmembers here.

Constitutionality of Escrow Requirement

The Charging Parties conclude their objections to the Recommended Decision by renewing their contention that the Commission's escrow requirement and M.G.L. c. 150E, Section 12 are unconstitutional because they arbitrarily deprive nonmembers of their property. We have considered and rejected variants of this challenge numerous times. In addition, School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70, 85 (1982), is adverse to the Charging Parties' central argument and is dispositive.

We adopt, without further comment, all other chargeability recommendations contained within the Recommend Decision. After making the modifications outlined above, we now total the Union's chargeable and nonchargeable costs.

CHARGEABLE COSTS OF THE MTA

SERVICE DIVISIONS	TOTAL COSTS	CHARGEABLE COSTS
AFFILIATE SERVICES	$5,813,075	$ 4,500,950
LEGAL SERVICES	$1,610,896	$ 56,454
GOVERNMENTAL SERVICES	$1,427,844	$ 0
COMMUNICATIONS	$ 784,603	$ 33,529
PROFESSIONAL DEVELOPMENT	$ 507,487	$ 261,469
RESEARCH	$ 252,081	$ 209,649
GOVERNANCE	$ 933,448	$ 871,158

(Excluding Program 4.1)		
SUBTOTALS	$11,329,434	$5,933,209 (52.4%)
Proportionally Chargeable Administative Divisions and Programs:		
GOVERNANCE 4.1	$ 253,781	$ 132,981
PRINTING & MAILING	$ 616,689	$ 323,145
M.I.S.	$ 657,613	$ 344,589
TELEPHONE & SUPPLIES	$ 191,862	$ 100,536
TERMINATION & SEVERANCE	$ 224,905	$ 117,850
DEPRECIATION	$ 158,527	$ 83,068
ADMINISTRATION & PERSONNEL Program 1.0	$ 386,220	$ 202,379
SUBTOTALS	$ 2,489,597	$1,304,548

The chargeable costs in each of these administrative divisions and programs equals 52.4.% of the total costs. This percentage is based on the percentage of total costs for the service divisions listed above that are chargable.

CHARGEABLE COSTS OF THE MTA

Other Divisions and Programs:		
ADMINISTRATION & PERSONNEL 2.0 and 3.0	$ 292,209	$ 263,359
FINANCE & ACCOUNTING	$ 565,908	$ 565,908
BUILDING OPERATIONS	$ 711,941	$ 608,229

FINAL TOTALS	$15,389,089[29]	$8,675,253

CONCLUSION

During 1990-91, the MTA had a total of 60,276 full-time equivalent members and agency fee payers. The total chargeable expenses for 1990-91 established in this proceeding are $8,675,253, for a per capita cost of $143.93. This per capita cost was $26.77 less than the amount of the agency service fee the Union demanded of the Charging Parties. Therefore, the MTA violated Section 10(b)(1) of the law by demanding that the Charging Parties pay an agency service fee that was $26.77 more than their pro rata share of the MTA's costs of collective bargaining and contract administration for fiscal year 1990-91.

ORDER

WHEREFORE, based on the foregoing, it is ORDERED, that the Massachusetts Teachers Association shall:

1. Cease and desist from demanding that the Charging Parties pay an agency service fee for 1990-91, in excess of $143.93.
2. Not seek the discharge of or any other sanction against any Charging Party for failing to pay an agency service fee for fiscal year 1990-91, in excess of $143.93.
3. Release to the Charging Parties $26.77 of the monies held in joint escrow, plus all accrued interest allocable to the $26.77 to the date of

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[29] This figure corrects a calculation error noted in the Recommended Decision.

dissolution of the escrow account for the agency service fee 1990-91.

4. Implement the terms of the settlement agreement (Joint Exhibit #1), thereby calculating the appropriate agency service fees for the MTA and the NEA for each year between, and including, 1987-1988 through 1991-1992, releasing from escrow to the Charging Parties the excess fees, plus all accrued interest allocable to the excess fees to the date of dissolution of the escrow accounts.
5. Post in all places where notices are normally posted for employees represented by the Massachusetts Teachers Association, and leave posted for a period of not less than thirty (30) days, copies of the attached Notice to Employees.
6. Notify the Commission in writing within ten (10) days of receipt of this decision of the steps taken to comply therewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS LABOR RELATIONS COMMISSION

/s/
Robert C. Dumont, Chairman

/s/
William J. Dalton, Commissioner

/s/
Claudia T. Centomini, Commissioner

Appeal Rights

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Labor Relations Commission are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such appeal, the appealing party must file a Notice of Appeal with the Labor Relations Commission within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

[Bar chart omitted in printing]

THE COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

NOTICE TO EMPLOYEES

POSTED BY ORDER OF
THE MASSACHUSETTS LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

After a hearing, the Labor Relations Commission has determined that the Massachusetts Teachers Association violated Section 10(b)(1) of the Law by demanding an agency service fee from employees it represents for 1991-92 from certain Charging Parties that is $26.77 in excess of the amount permitted by Section 12 of the Law.

WE WILL NOT demand an agency service fee in excess of $143.93 from individuals who have filed a timely agency service fee challenge for 1991-92.

WE WILL NOT in any like or similar manner interfere with, restrain, or coerce employees in the exercise of their rights under the Law.

WE WILL NOT seek any sanction against any Charging Party for failing to pay an agency fee in excess of $143.93 for 1991-1992.

WE WILL refund to the Charging Parties $26.77 of the monies held in escrow plus interest allocable to that amount accrued to the date of dissolution of the escrow account.

_____

President
Massachusetts Teachers Association

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Commission's Office, 1604 Leverett Saltonstall Building, 100 Cambridge Street, Boston, Massachusetts (Telephone: 727-3505)

APPENDIX A (LIST OF CASES)

CHARGING PARTY	EDUCATION ASSOCIATION	CASE #
GALLUCCIO, RONALD	ARLINGTON	ASF-2233
STORLAZZI, EDMUND	ARLINGTON	ASF-2051
DUPUIS, DAVID	BRIDGEWATER	ASF-2097
DUPUIS, ELEANOR	BRIDGEWATER	ASF-2098
CLARK, WILLIAM L	CHICOPEE	ASF-2235
CRANE, RUBY	CHICOPEE	ASF-2225
CRANE, HARRY	CHICOPEE	ASF-2224
MACHOWSKI, KASMIR S	CHICOPEE	ASF-2226
ANTHONY, PETER P	FAIRHAVEN	ASF-2057
CIPOLLINI, CHARLES	FAIRHAVEN	ASF-2056
ANSELME, JEAN-PIERR	FSU	ASF-2216
BLACXWELL, JAMES E	FSU	ASF-2217
BRANCH, BEN	FSU	ASF-2202
CHAPPELL, VERA	FSU	ASF-2203
DAVIS, ROBERT	FSU	ASF-2204
DYM, CLIVE L	FSU	ASF-2205
EBERSOLE, JOHN P	FSU	ASF-2218
FOSS, CLIVE	FSU	ASF-2219

GARRETT, GERALD R	FSU	ASF-2220
HARRISON, EDWARD R	FSU	ASF-2206
JACOBSON, BRUCE S.	FSU	ASF-2207
KREISLER, MICHAEL	FSU	ASF-2208
LACEY, NELSON J	FSU	ASF-2209
MAHON, HAROLD P	FSU	ASF-2221
MALONE, MICHAEL F	FSU	ASF-2210
MESTRE, JOSE	FSU	ASF-2211
MOVAHEDI, SIAMAK	FSU	ASF-2222
NASH, WILLIAM A	FSU	ASF-2212
PALMER, JOHN D	FSU	ASF-2213
ROTTENBERG, SIMON	FSU	ASF-2214
SCHWARTZ, LOWELL M	FSU	ASF-2223
SEIFORD, LARRY	FSU	ASF-2215
DONAHUE, THOMAS J	HOLYOKE	ASF-2054
ARMSTRONG, CLYDE	NEW BEDFORD	ASF-2122
ARMSTRONG, CLYDE	NEW BEDFORD	ASF-2134
BURCHELL, MARGUERITE	NEW BEDFORD	ASF-2123

BURCHELL, MARGUERITE	NEW BEDFORD	ASF-2135
CARREIRO, RICHARD	NEW BEDFORD	ASF-2124
CARREIRO, RICHARD	NEW BEDFORD	ASF-2136
FINNERTY, LAWRENCE	NEW BEDFORD	ASF-2236
FLYNN, DEBORAH	NEW BEDFORD	ASF-2125
FLYNN, DEBORAH	NEW BEDFORD	ASF-2137
HARPER, MARIAL M	NEW BEDFORD	ASF-2128
HARPER, MARIAL M	NEW BEDFORD	ASF-2140
HEBERT, SYLVIA	NEW BEDFORD	ASF-2126
HEBERT, SYLVIA	NEW BEDFORD	ASF-2138
KENNEDY, KATHLEEN	NEW BEDFORD	ASF-2119
KENNEDY, KATHLEEN	NEW BEDFORD	ASF-2131
MARKEY, NORMA	NEW BEDFORD	ASF-2237
PALLATRONI, JEANNE	NEW BEDFORD	ASF-2121
PALLATRONI, JEANNE	NEW BEDFORD	ASF-2133
SHEPHERD, ELLEN	NEW BEDFORD	ASF-2129
SHEPHERD, ELLEN	NEW BEDFORD	ASF-2141

WHITMAN, HELEN	NEW BEDFORD	ASF-2238
ADAMS, HELENE	SPRINGFIELD	ASF-2102
ADAMS, HELENE	SPRINGFIELD	AFS-2111
BARNETT, SHARON	SPRINGFIELD	ASF-2112
BARNETT, SHARON	SPRINGFIELD	ASF-2103
BEAUREGARD, ELIZABETH	SPRINGFIELD	ASF-2104
BEAUREGARD, RAYMOND J	SPRINGFIELD	ASF-2105
BELHUMEUR, JAMES	SPRINGFIELD	ASF-2162
BURGER, MARY	SPRINGFIELD	ASF-2144
BURGER, MARY	SPRINGFIELD	ASF-2163
BURNS, MICHAEL	SPRINGFIELD	ASF-2145
BURNS, MICHAEL	SPRINGFIELD	ASF-2164
BURNS, PATRICIA	SPRINGFIELD	ASF-2146
BURNS, PATRICIA	SPRINGFIELD	ASF-2165
CANAVOSIO, CAROLYN	SPRINGFIELD	ASF-2113
CANAVOSIO, CAROLYN	SPRINGFIELD	ASF-2106
CARLSON, NANCY S	SPRINGFIELD	ASF-2148

CARLSON, NANCY S	SPRINGFIELD	ASF-2167
COOK JR, KENNETH E	SPRINGFIELD	ASF-2239
COOK JR, KENNETH E	SPRINGFIELD	ASF-2243
DANTON, SUSAN J	SPRINGFIELD	ASF-2183
DOWNEY, BRIAN J	SPRINGFIELD	ASF-2060
DOWNEY, BRIAN J	SPRINGFIELD	ASF-2061
ETHIER, RAYNA D	SPRINGFIELD	ASF-2244
FENTON, DENNIS A	SPRINGFIELD	ASF-2114
FENTON, DENNIS A	SPRINGFIELD	ASF-2107
FINKEL, BARBARA W	SPRINGFIELD	ASF-2149
FINKEL, BARBARA W	SPRINGFIELD	ASF-2168
FLINT, JEAN Z	SPRINGFIELD	ASF-2108
FLINT, JEAN Z	SPRINGFIELD	ASF-2115
FREEMAN, BARBARA A	SPRINGFIELD	ASF-2150
FREEMAN, BARBARA A	SPRINGFIELD	ASF-2169
GILBERT, DEBORAH	SPRINGFIELD	ASF-2151
GILBERT, DEBORAH	SPRINGFIELD	ASF-2170

GOODERMOTE, WALDO	SPRINGFIELD	ASF-2152
GOODERMOTE, WALDO	SPRINGFIELD	ASF-2171
GROSS, ESTELLE A	SPRINGFIELD	ASF-2153
GROSS, ESTELLE A	SPRINGFIELD	ASF-2172
KARR, ELIZABETH	SPRINGFIELD	ASF-2184
KENNEDY, ANGELA	SPRINGFIELD	ASF-2154
KENNEDY, ANGELA	SPRINGFIELD	ASF-2172
KEOGH, HARRIET S	SPRINGFIELD	ASF-2240
KEOGH, HARRIET S	SPRINGFIELD	ASF-2245
LE CLAIR, STEPHEN	SPRINGFIELD	ASF-2116
LE CLAIR, STEPHEN	SPRINGFIELD	ASF-2109
LE MAY, PATRICIA	SPRINGFIELD	ASF-2241
LE MAY, PATRICIA	SPRINGFIELD	ASF-2246
LUNDRIGAN, EDWARD	SPRINGFIELD	ASF-2155
LUNDRIGAN, EDWARD	SPRINGFIELD	ASF-2174
MACPHAUL, LAURA	SPRINGFIELD	ASF-2156

MACPHAUL, LAURA	SPRINGFIELD	ASF-2175
MANOLAKIS, ELLEN	SPRINGFIELD	ASF-2242
MANOLAKIS, ELLEN	SPRINGFIELD	ASF-2242
MANOOGIAN, MARTIN	SPRINGFIELD	ASF-2185
MAZZAFERRO, MARIA	SPRINGFIELD	ASF-2157
MAZZAFERRO, MARIA	SPRINGFIELD	ASF-2176
O BRIEN, GERALD	SPRINGFIELD	ASF-2158
O BRIEN, GERALD	SPRINGFIELD	ASF-2177
ROBERTS, NANCY	SPRINGFIELD	ASF-2117
ROBERTS, NANCY	SPRINGFIELD	ASF-2110
SANDERSON, WILLIAM E	SPRINGFIELD	ASF-2159
SANDERSON, WILLIAM E	SPRINGFIELD	ASF-2178
YARMESKY, MARGARET	SPRINGFIELD	ASF-2161
YARMESKY, MARGARET	SPRINGFIELD	ASF-2180
WOOD, BETSY ANN	WAREHAM	ASF-2055
CROSS, GENEVIEVE	WOBURN	ASF-2229

GALLUCCIO, DIANE	WOBURN	ASF-2230
GARVEY, ANNE	WOBURN	ASF-2231
LUCHINI, ANN	WOBURN	ASF-2232
BADGIO, JAMES D	WORCESTER	ASF-2062
BADGIO, JAMES D	WORCESTER	ASF-2079
CONNOLLY, JAMES	WORCESTER	ASF-2063
CONNOLLY, JAMES H	WORCESTER	ASF-2080
DAVIS, ROBERT	WORCESTER	ASF-2064
DAVIS, ROBERT	WORCESTER	ASF-2081
DOUGAL, BRIAN	WORCESTER	ASF-2065
DOUGAL, BRIAN	WORCESTER	ASF-2082
DOWD, JOHN F	WORCESTER	ASF-2096
ELWORTHY, DAVID E	WORCESTER	ASF-2066
ELWORTHY, DAVID E	WORCESTER	ASF-2083
GALLI, HUGO	WORCESTER	ASF-2067
GALLI, HUGO	WORCESTER	ASF-2084
GUILIANO, FRANCIS	WORCESTER	ASF-2068
GUILIANO, FRANCIS	WORCESTER	ASF-2085

GUSTAFSON, JOSEPH	WORCESTER	ASF-2069
HERBST, RICHARD	WORCESTER	ASF-2070
HERBST, RICHARD	WORCESTER	ASF-2087
MANDELL, JOHN	WORCESTER	ASF-2118
MARZILLI, JOHN F	WORCESTER	ASF-2071
MARZILLI, JOHN F	WORCESTER	ASF-2088
MCGRAIN, CAROL	WORCESTER	ASF-2072
MCGRAIN, CAROL	WORCESTER	ASF-2089
MCGRAIN, THOMAS	WORCESTER	ASF-2073
MCGRAIN, THOMAS	WORCESTER	ASF-2090
MORELLE, LORETTA	WORCESTER	ASF-2074
MORELLE, LORETTA	WORCESTER	ASF-2091
PAPANDREA, ARTHUR J	WORCESTER	ASF-2075
PAPANDREA, ARTHUR J	WORCESTER	ASF-2092
POCARO, FRANCIS	WORCESTER	ASF-2076
POCARO, FRANCIS	WORCESTER	ASF-2093
RICCIARDI, RICHARD	WORCESTER	ASF-2077

RICCIARDI, RICHARD	WORCESTER	ASF-2094
SIMMARANO, MICHAEL V	WORCESTER	ASF-2078
SIMMARANO, MICHAEL V	WORCESTER	ASF-2095

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
BEFORE THE LABOR RELATIONS COMMISSION

In the Matter of	*	
	*	
SPRINGFIELD EDUCATION ASSOCIATION, MASSACHUSETTS TEACHERS ASSOCIATION, NATIONAL EDUCATION ASSOCIATION, ET AL.	*	Case Nos. ASF- 2143, et al.
	*	Date Issued:
	*	March 21, 1996
and	*	
	*	
JAMES J. BELHUMEUR, et al.	*	

Administrative Law Judge:
Tammy Brynie, Esq.[1]

Appearances:

Ann Clarke, Esq. Brian Riley, Esq. Susan Lee Weissinger, Esq. Margery Williams, Esq.	-for the Springfield Education Association, Massachusetts Teachers Association, NEA, et al.
Bruce Cameron, Esq. Glenn Taubman, Esq.	-for James J. Belhumeur, et al.
William C. Conner	-Pro Se

[1] Acting as specially designated Commission Counsel, pursuant to Chapter 23, Section 9R, 456 CMR 18.04.

RECOMMENDED FINDINGS OF FACT AND RECOMMENDED CONCLUSIONS OF LAW

Statement of the Case

James Belhumeur, and numerous others (collectively referred to as the Charging Parties), filed charges with the Labor Relations Commission (Commission). The charges alleged that affiliates of the Massachusetts Teachers Association/NEA had demanded agency service fees for fiscal years 1987-88, 1988-89, 1989-90, 1990-91, and 1991-92, in excess of the amount permitted by G.L.c. 150E (the Law), in violation of Section 10(b)(1) of the Law.

In 1992, the Charging Parties (including Pro Se Challenger Conner), and the MTA, the NEA and the local unions (Unions) executed a settlement agreement concerning the disposition of the issues relating to the agency service fees demanded for fiscal years 1987-88, 1988-89, 1989-90, 1990-91 and 1991-92. The parties agreed that the lawful amount of the MTA portion of the agency service fee would be litigated in terms of a percentage of dues assessed for each of the fiscal years, and would be based on the Unions' actual expenditures for fiscal year 1990-91, the figures that formed the basis of the MTA's 1991-1992 agency service fee demand.[2] The settlement stipulated that the lawful NEA fee amount would be ten percentage points less than the final chargeable percentage determined for the MTA.[3] Ultimately, however, no

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[2] The 1991-92 demand is MTA Exhibit #1.

[3] The parties' agreement is Joint Exhibit #1.

agreement concerning the amount of local fees was reached.

The Commission ordered that the hearings regarding the local portions of the fees be bifurcated from a consolidated hearing involving the Massachusetts Teachers Association (MTA) and the National Education Association (NEA) fee portions.[4] Pre-hearing discovery, pursuant to Commission Rule 17.13, 456 CMR 17.13, was held at the MTA offices in July and August of 1992.

A formal hearing, pursuant to Commission Rule 13.01, 456 CMR 13.02, commenced on February 8, 1993, and continued intermittently for fifty-three (53) days thereafter, concluding on December 14, 1994. In an effort to expedite the litigation, the Commission modified its hearing procedures during the course of the proceedings. As a result of the July 1,1993 Commission Order, in lieu of direct examinations, the parties were required to prepare and submit detailed affidavits from each witness. Cross and redirect examinations, however, were conducted in my presence, thereby preserving my ability to render necessary credibility determinations. All parties were afforded the opportunity produce documentary and testimonial evidence. Post-hearing briefs were filed on or before May 8, 1995 and reply briefs were filed on or before July 10, 1995.

I recommend that the MTA's 1991-92 agency service fee be found to be $26.29 in excess of the amount permitted by Law, and to constitute 66.5% of the total dues amount. I reach this recommendation as a result of the analysis detailed below.

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[4] Additionally, all other pro se challengers filed settlements agreeing to be bound by the instant litigation's outcome.

I. INTRODUCTION AND FRAMEWORK FOR ANALYSIS

G.L. c. 150E, Section 12, as limited by the First Amendment to the United States Constitution, permits a public sector union to collect a service fee from nonmembers to cover their pro rata share of the costs of collective bargaining. Lyons v. Labor Relation Commission, 397 Mass. 498, 501 (1986); Newton Teachers Association (Newton I), 13 MLC 1589, 1594 (1987).[5] For a union expenditure to be constitutionally charged to an objecting nonmember, it must: (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burden of free speech that is inherent in the allowance of an agency or union shop. Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991).[6] A union that demands an excessive fee violates G.L.c. 150E, Section 10(b)(1). School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70, 76 (1982).

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[5] To demonstrate that its fee includes only the employee's pro rata share of collective bargaining expenses, the union must demonstrate those expenses as well as the total number of employees represented. Woburn Teachers Association, 13 MLC 1555 (1987); 456 CMR 17.04

[6] In several respects, the Commission's long-standing delineation of "permissible" and "impermissible" expenditures, 456 CMR 17.04, does not comport with the current Lehnert requirements. Moreover, Charging Party Conner's assertion that the MTA was obligated to specifically categorize its costs according to 456 CMR 17.04 is similarly outdated.

Public employees who object to the amount of the fee are responsible for voicing their objections. Chicago Teachers Union, Local 1 v. Hudson, 475 U.S. 292 (1986), Abood v. Detroit Board of Education, 431 U.S. 209, 238 (1977). An employee who objects to the amount of the fee must voice that objection by filing a prohibited practice charge. However, once the fee is challenged, the union bears the burden of producing sufficient evidence to persuade the Commission that the fee reflects the fee payer's proportionate share of the union's chargeable expenditures. Greenfield, Id. at 85; 456 CMR 17.15(2).[7]

While a union bears the ultimate burden of persuasion concerning the service fee calculation, it need not present evidence, in its case-in-chief, as to every single union expenditure and every specific union activity during the period for which the fee is claimed. Instead, the Commission has indicated that a union may rely on a prima facie showing that its service fee calculations are correct. Woburn Teachers Association, 13 MLC 1555, 1564 (1987); Milford Teachers Association, 13 MLC 1568, 1576 (1987).

A union's initial burden is to produce enough credible detail to warrant a finding that each assessed expenditure is chargeable. Unless an expenditure is inherently related to collective bargaining,[8] the Union must show be detailed

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[7] The Commission's regulations categorize union expenditures as either "permissible" or "impermissible." However, I adopt the more universally recognized "chargeable" and "nonchargeable" terminology.

[8] "Grievance arbitration fees" is an example of a class of expenditure that requires no further explanation to be initially deemed chargeable. See Woburn, 13 MLC at 1564.

documentary or reliable testimonial evidence how a particular expense is chargeable. Woburn, 13 MLC at 1564-65. Once a union makes such a prima facie showing of chargeability, it is reasonable and appropriate to require charging parties to probe the union's evidence and to demonstrate that certain expenditures should be considered nonchargeable.[9] In meeting this limited burden of production, an objector is aided by Commission Rule 17.13, 456 CMR 17.13, which affords an opportunity for pre-hearing discovery.[10]

This framework does not contravene the requirement that unions bear the burden of proving the chargeability of their expenditures. Rather, this paradigm replicates the long-standing respective burdens of persuasion and production assumed by litigants in discrimination cases, with the union carrying the ultimate burden of persuasion, like that borne by the alleged discriminatee. See, e.g., Trustee of Forbes Library v. Labor Relations Commission, 384 Mass. 559, 566 (1981); Wheelock College v. Massachusetts Commission Against Discrimination, 371 Mass. 130 (1976). Moreover, this analytical model recognizes and accommodates the many competing rights

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[9] Requiring the objecting non-members to assume a limited burden of production does not transgress the caution that any adopted procedures should not place too great a burden on the objecting nonmembers. Greenfield, 385 Mass. at 282; Abood v. Detroit Board of Education, 431 U.S. 209, 239-240 n. 40 (1977).

[10] Rule 17.13 provides, in pertinent part:

> At least seven (7) days before the hearing the bargaining agent upon request shall make available to the charging party the books and records on which the bargaining agent relies to justify the amount of the service fee demanded.

and interests at issue here. See Antry v. Illinois Educational Labor Relations Board, 552 NE 2d.313, 341-342 (Ill. App. 4 Dist 1990).

Overall, the right of objecting nonmembers not to pay significant amounts for the support of union activities unrelated to collective bargaining must be balanced against the right of a union to be reimbursed for the service it provides such fee payers. See Greenfield, 385 Mass. at 85. The right of the fee payers to insist that the agency service fee calculation have an adequate evidentiary basis must be balanced against the Hudson charge that all parties to the fee determination should receive a reasonably prompt decision, Hudson, 475 U.S. at 307. The proceedings adjudicating the ultimate amount of an agency service fee should not be so complex and burdensome that they consume an inordinate amount of the litigants finite funds or exhaust the limited administrative resources of the Commission. Nor should it be more economical for unions to forego their rights to the fees rather than to insist upon their payment. See, e.g, Albro v. Indianapolis Education Association, 585 N.E. 2d 666, 672 (Ind. App. 2 Dist. 1992).

It has long been recognized that absolute precision in the agency service fee calculation is not, and should not, be expected or required. See, e.g., Railway Clerks v. Allen, 373 U.S. 113, 122 (1963); Abood, 431 U.S. at 234 n.40; Hudson, 475 U.S. at n.18. Foreshadowing the magnitude and breadth of issues here, the court was "mindful of the difficult accounting problems that may arise." Abood, 431 U.S. at 239, n. 40, quoting, Allen, 373 U.S. at 122. Reviewing courts have heeded the admonition against absolute precision and have applied a standard of reasonableness when reviewing accounting

procedures. See Bromely [sic] v. Michigan Education Association, 843 F. Supp. 1147, 1156 (E.D.Mich. 1994)(accounting procedures used to calculate fee were reasonable; fully charging for overhead exsenses was not unreasonable); Laramie v. County of Santa Clara, 784 F. Supp. 1492, 1499 (1992)(fees should be, "for lack of a better word, fair"). With this analytical framework, I turn to the case at hand.

At the outset, the Charging Parties argue that the Commission need not toil through the mountains of record material to determine the nature and amount of the MTA's chargeable expenses. Instead, the Charging Parties urge the Commission to take a "short cut,"[11] by again focusing its attention on the present demand; a demand that is asserted to be replete with fatal errors, oversights and omissions. The Charging Parties argue that due to the scope and magnitude of the alleged errors demonstrated through the course of the hearing, and the corresponding lack of care and attention paid by the MTA in compiling its demand, the MTA is entitled to no fee. Massachusetts case law supports such a result, the Charging Parties argue, citing to Greenfield and Belhumeur v. Labor Relations Commission, 411 Mass. 142 (1991). The Charging Parties assert that in announcing that it is a prohibited practice for a union to "assess . . . an agency service fee in excess of an employee's proportional share" of collective bargaining expenses, Greenfield, 385 Mass. at 76, the Court "means the union must get its initial demand right." (Charging Parties' Brief, Vol. I, p. 39). Finally, the Charging Parties argue that the MTA's demand fails to meet the "carefully crafted" standard the

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[11] Charging Parties Brief, Volume I, page 1.

Court adopted in Belhumeur, and should, therefore, be nullified. (Charging Parties' Brief, Vol. I, p. 40).

The Union raises two defenses. First, the Union insists that the "short cut" route is barred because the validity of the present demand has already been tested and deemed adequate. Second, even if the Charging Parties were not precluded from renewing their challenge to the validity of the present demand, the Union contends that it is settled that the accuracy of an agency service fee demand does not determine the union's entitlement to the fee. (MTA Reply Brief, at p. 18-23). In this instance, I generally agree with the Union.

The Belhumeur decision relied upon by the Charging Parties represents the Supreme Judicial Court's determination that the demand in this case is adequate. Therefore, the Charging Parties are precluded from focusing again on the sufficiency of the identical demand. See Tausevich v. Board of Appeals of Stoughton, 402 Mass. 146, 149-150 (1988); Gleason v. Hardware Mutual Casualty Co., 331 Mass. 703, 710 (1954). While the Charging Parties undoubtedly learned more about how the MTA prepared its demand during the protracted amount hearing, at least one demand flaw the Charging Parties cite -- the failure to reduce the Research Division's management budget to reflect the percentage of nonchargeable activity undertaken in that division -- is apparent, in their view, from a "quick look" at the demand. (Charging Parties' Brief, Vol.I, p. 24). Because the Charging Parties' current claim could have been raised in the earlier proceeding, it is now barred. See Saint Louis v. Baystate Medical Center, 30 Mass.App.Ct. 393, 399 (1991)(claim arising out of the same life situation that could have been, but was not, raised in prior litigation, is barred).

Even if the previous Belhumeur litigation does not bar the Charging Parties' proposed route, it is a serious substantive roadblock. Indeed, contrary to the Charging Parties' assertion that Massachusetts law requires a union to get a demand right, the Supreme Judicial Court has indicated that the demand is intended for notice purposes only, not to resolve any chargeability issue. Specifically:

> The information that the union must provide under the Hudson opinion is not intended to be dispositive of any dispute. That information is designed only to permit an agency fee payer to decide whether to oblige the union to prove before an independent fact finder that the agency fee charged was properly determined.

Belhumeur, 411 Mass. at 146. Numerous courts have rejected attempts similar to the one here to, in essence, transform Hudson notice issues into chargeability determinations. See, e.g., Hudson v. Chicago Teachers Union, Local No. 1, 922 F.2d 1306, 1314 (7th Cir. 1991), cert. denied 501 U.S. 1230 (1991)(attempting to equate the adequacy of the notice with the accuracy of the fee assessment contradicts Hudson's holding and rationale); Jibson v. Michigan Education Association, 30 F.3d 723, 730-731 (1994); Browne v. Wisconsin Employment Relations Commission, 485 N.W.2d 377, 391 (1992); Laramie v. County of Santa Clara, 784 F. Supp 1492, 1497 (1992); Lucid v. City and County of San Francisco, 774 F. Supp 1234, 1238 n.4 (1991). Therefore, I decline to find that the MTA has forfeited its right to collect any fee due to asserted defects in its demand and, instead, I turn to a full analysis of the formidable evidentiary record.

II. OVERVIEW OF THE MASSACHUSETTS TEACHERS ASSOCIATION

The MTA is a public employee organization that, in 1990-1991 represented 60, 276 full-time equivalent employees[12] of municipal and regional school systems and the Massachusetts higher education system. The MTA represented not only instructional personnel, but also secretaries, clericals, custodians, nurses and cafeteria workers. Eight thousand employees, including full and part-time faculty, administrators and support staff, are represented in the eight state-wide higher education bargaining units. The MTA's headquarters is in Boston, at 20 Ashburton Place, and it has six regional offices, located in Braintree, Auburn, Lynnfield, Raynham, West Springfield and Pittsfield.

The MTA has a unified dues structure, and every member is required to join, and pay dues to, his or her local association, the MTA, and, its national affiliate, the NEA. Likewise, an agency service fee has three components: a local portion, the MTA fee and the NEA charges. The MTA calculates its annual dues by subtracting projected revenues (except for dues) from total budgeted expenses, dividing that number by the projected number of full-time members for the upcoming year and rounding the result up to the next full dollar.

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[12] The Charging Parties object to the MTA's use of a "teacher-centric" full-time equivalent numeral in its agency service fee calculations. (Charging Parties' Brief, Vol. I, p. 26). However, the use of a full-time equivalent membership figure is a reasonable accounting procedure.

The MTA is governed by elected officials, consisting of a president, vice-president, an executive committee and a board of directors. All MTA officers, Board of Director and Executive Committee members are elected at the Annual Meeting of Delegates. In addition to selecting the organization's governing officials, the delegates approve the MTA budget and vote on proposed resolutions and new business items. The Board is the primary governing body of the MTA, having complete control over the affairs of the Union when the annual meeting of delegates is not in session. The Board employs every managerial or supervisory employee of the MTA.

There are eight regional Executive Committee members, who are ex officio Board members. The Executive Committee manages the real estate, personnel and financial matters of the MTA. It recommends an annual budget to the Board of Directors, which is subsequently recommended to the Annual Meeting for adoption.

During 1990-91, the MTA employed 127 individuals in eleven divisions. The MTA characterizes its divisions as either service or administrative in nature. Affiliate Services, Legal Services, Communications, Professional Development and Research comprise the service divisions; while Governance, Finance and Accounting, Administration and Personnel, Data/Word Processing and Printing and Mailing are the administrative branches of the MTA's operation. MTA employees are organized into internal staff unions, with the Field Service Organization (FSO) representing certain professional staff in the headquarters, as well as the field representatives in Affiliate Services; the Massachusetts Association of Teacher Attorneys (MATA) representing Legal Services' attorneys, and the

MTA Staff Organization (MTASO) representing support, building and the Printing and Mailing Division staff.

For approximately a decade, the MTA has maintained a program-based budget, whereby its budget is organized by division and by each division's major functions, referred to as programs. In turn, the major program areas are often divided into subprograms. Each program and subprogram has a verbal description, detailing the function of the division and the services provided to bargaining unit members and MTA affiliates, and a corresponding numerical code, all of which are described in MTA #1. The program and subprogram descriptions were developed by the individual division managers to reflect the division's activities and its staff's functions. While a division's major program areas remain relatively constant from year to year, minor changes may be incorporated into the program descriptions. Finally, some budget items, consisting primarily of operating costs or overhead items, are not tied to expenses or activities within MTA divisions. These expenses include local support, severance pay, termination expenses, depreciation, telephone and supplies and building operations.

All non-payroll checks issued by the MTA are recorded in its general ledger and total approximately 15,000 transactions per fiscal year. The MTA's fiscal year runs from July 1 through June 30. Each MTA expenditure is assigned a multi-digit account code, which includes the code for the division in which the expense was incurred, the program designation, the subprogram code and the account number. For example, an invoice bearing the following annotation: MA1A113110 is decoded to show that the expense is allocated to MA1-Central Division, Program Area A1, 1.3 Subprogram, Account number

110.[13] All general ledger entries are grouped by division and account number. General ledger entries indicate expenses allocated, not checks issued, because one check may cover expenses for several programs.

Vendor expenses -- which the MTA refers to as a direct cost, MTA Brief, p. 5 -- consist of items like rent, supplies, postage, utilities and hotel and food charges associated with conferences and meetings. Some vendor expenses are paid upon receipt of an invoice; others are initiated by a purchase order. A division manager will assign an account code to his or her division's vendor expenses before forwarding the item to Finance and Accounting for payment. Finance and Accounting inputs the vendor, account code and amount and data/word processing (also know as M.I.S.) prints the check. The check receives a final review in Finance and Accounting and then issues.

In addition to employee wages or salaries, the MTA's payroll expenses include payroll taxes, pension contributions, health, dental, life and disability insurance, workers' compensation and overtime costs. Payroll expenses are listed in an unallocated account during the year, by journal entry. Most professional staff and managers

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[13] The division codes are: MA1--Central Regional Office; MA2--Metropolitan Regional Office; MA--Northeast Regional Office; MA4--Southeast Regional Office; MA5--Western Regional Office; MA6--Pittsfield Office; MA7--Higher Education; MA8, Boston Operation; MBO Communications; MC0--Governmental Services; MDO--Legal Services; MEO Professional Development; MFO--Research, MG1 Administration and Personnel; MGO--Building; MHO--Finance and Accounting; MIO--Governance; MJI--Data Processing; MJ3--Printing and Mailing; MJ4--Word Processing; MJ5--Depreciation.

within the MTA maintained daily time and activity records.[14] On the time sheets, employees recorded the following information: the date, the nature of the service being performed, the division's program code which describes their current activity, the location of the service, the local association (if any) and the number of hours. In general, time was allotted in half-hour segments, excepting the Legal Division's attorneys, who recorded their time in six-minute intervals.[15] The time sheets are reviewed by the divisional managers and then given to support staff for inputting into the MTA computer, where the data can be accessed by Finance and Accounting.

At the end of each fiscal year, Finance and Accounting essentially "spreads" the MTA's payroll costs among its budgeted programs and subprograms. First, Finance and Accounting determines the percentage of total employee time reflected on the year's time sheets in each subprogram in each division. Then, the percentages are applied to the total salaries and benefits of all employees in that division -- including support staff, who do not keep time sheets -- to allocate total payroll costs among the subprograms. Vacation, sick and personal leave, collectively referred to as "9.9 time", are not included in calculating the percentage of employee time devoted to subprograms.

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[14] All employees within the FSO bargaining unit, the MATA bargaining unit and some managerial employees are required to complete contemporaneous weekly activity reports. Exceptions included MTA Executive Director-Treasurer Edward Sullivan and the employees in Finance and Accounting, MIS and Printing and Mailing, all of whom did not keep time sheets.

[15] The legal division also recorded their time on different time sheets, tracking their time by assigned case number.

However, the "9.9 time" is one of the payroll costs that are proportionally allocated among the divisional subprograms. When the computer data indicates employee time, but notes no corresponding program designation, the time is allocated like "9.9 time."

MTA employees are reimbursed for business mileage, meals, parking and tolls. Employees complete weekly expense reports, which are submitted to their divisional managers for review. The expense calculations are then verified by Finance and Accounting and an expense check issues. In general, an individual's expenses are allocated to program areas according to the percentage of time spent on activities in each program area. For example, an employee in Affiliate Services, Communications, Professional Development or Research would calculate the time spent that week in each major program and allocate his or her total expenses accordingly. To prepare MTA #1, expenses were further allocated to subprogram activities, based on the total percentage of employee time spent in each subprogram. The practice in Legal Services differed, with the attorneys allocating their expenses by program and case number. Occasionally, an employee would allocate an expense directly to the subprogram that generated the expense. Certain large expenses, generally incurred either attending conventions or conferences, like air fare, hotels and meals, are not treated as personal expenses, but are allocated to specific accounts.

There are a number of organizations and other entities that are associated with the MTA. Several groups, such as the Massachusetts Music Educators Association and the Massachusetts Elementary Principals' Association, share common educational concerns with the MTA and, although they are not employee organizations within the

meaning of the Law, they pay an annual affiliation fee to the Union. As a result of their affiliation, the groups are entitled to a delegate at the MTA's Annual Meeting. The MTA also has county affiliates, such as the Bristol County Educators Association.

The Educators' Services Corporation (ESC) is a wholly-owned subsidiary of the MTA, which rents space in the Boston office and employs approximately 20 individuals. The ESC provides a range of non-employment related benefits, available only to MTA members. In return for a fee (containing personnel charges and a management fee component), the MTA provides administrative and legal support to ESC.

The Massachusetts Education Association is a non-profit corporation created to maintain a Professional Rights Fund. The Fund provides interest-free loans to MTA members who suffer salary interruptions as a result, for example, of dismissals or strikes. The Fund is subsidized through donations and fund-raising and is maintained by MTA Finance and Accounting personnel, in a separate account. Finance and Accounting personnel devoted approximately ten (10) minutes to fifteen (15) minutes per month to generating a monthly Fund report.[16] During 1990-91, the Fund made no new loans, but finance and accounting personnel sent some letters to collect overdue loans.

The Teachers Trust Fund is a corporate entity established to provide financial assistance to teachers and to locals that incur debts as a result of strikes. The parties

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[16] I credit the testimony of Richard Anzivino's estimate of the time necessary to generate the Fund report, an estimate based on his experience processing the Fund information.

stipulated that expenses incurred on behalf of this fund are nonchargeable. The Teachers Trust Fund is governed by trustees who are MTA members, but the MTA officers do not have a formal relationship with this group. The Teachers Trust Fund is financed through fund-raising events.

The Voice of Teachers for Education (VOTE) is the MTA's political action committee within the meaning of G.L. c. 55. The VOTE Board of Directors is elected by Congressional district by dues-paying members of VOTE. The VOTE Board determines candidate endorsements and campaign contributions. Some MTA Board members are on the VOTE Board. MTA Executive Director-Treasurer Sullivan also serves as VOTE Treasurer. VOTE is funded through VOTE dues, donations, fund-raising activities and through automatic payroll deductions, where such a provision is included in the local collective bargaining agreement. One Finance and Accounting employee administers the VOTE account, making deposits, writing checks and supplying information to the General Counsel for required campaign finance reports. The time required to administer the VOTE account totals approximately ten (10) hours per year.

The MTA's 1991-1992 agency service fee was prepared after Finance and Accounting had allocated the time and expenses to the appropriate programs and subprograms at the end of the 1990-1991 fiscal year. MTA Staff Counsel Riley, in conjunction with the auditors, prepared the fee calculation on the basis of those allocations. In preparing the demand, neither Riley nor the auditors reviewed the underlying records of each division. Instead, they relied upon the time accounting and budget information collected by finance and accounting.

Agency service fee case law was reviewed by Riley and the auditors and, following discussion, chargeability determinations were made. Governance, Building Operations and Finance and Accounting were considered to be fully chargeable overhead divisions. Any administrative program within a division (for example Affiliate Services program 5.0) was treated as chargeable in proportion to the other costs of the division. Administrative divisions, including Administration and Personnel, M.I.S., Printing and Mailing, Telephone and Supplies, Depreciation, and Termination and Severance, were treated as chargeable in proportion to the costs of the service (e.g., Affiliate Services, Communications, Professional Development, Research) divisions.

After a total chargeable figure was calculated, Riley and the auditors subtracted a $1 million buffer from the figure and divided the result by the 60,276 full-time equivalent bargaining unit members represented by the MTA. The result, $161.76, represented 75.54% of 1990-1991 dues. They then applied that percentage to 1991-1992 dues, for a 1991-1992 agency service fee of $170.70.

III. MTA'S PRIMA FACIE CASE AND ITS TIME ACCOUNTING SYSTEM

During the evidentiary hearing, the MTA presented evidence concerning the chargeability of its activities on a program-by program basis. Managers or supervisors within every division performing services for which the MTA seeks to charge nonmembers provided hearing testimony, as did all five regional managers in Affiliate Services. Each witness verified the nature of the services

provided in his or her division and confirmed, modified or amplified upon the division's program descriptions delineated in MTA #1. When available, each division's quarterly reports, prepared for the Board, outlining the division's activities and endeavors were introduced.[17] The witnesses provided substantial supporting detail concerning the nature of the activities performed by his or her division under each program and sub-program area.

Each manager or supervisor confirmed that professional employees maintained contemporaneous time and activity reports that, to the best of his or her knowledge, were accurate. Most employees' time sheets are "signed-off" by an upper echelon of management, thereby providing an internal level of review and verification. For example, within Affiliate Services, each regional manager reviews and co-signs the activity and expense reports generated in his region. In turn, the regional managers' personal time sheets and expense reports are reviewed by headquarter's staff. I credit the general testimony that, due to frequent staff interactions within the regional offices, and among divisional personnel, the managers are generally aware of the parameters of their subordinates' work. Therefore, the managers review the reports for

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[17] I credit the cumulative testimony of the MTA's divisional managers concerning the compilation of the quarterly reports. I consider the reports to be generally accurate descriptions of the work engaged in by the division for the stated period of time. I understand, however, that they were written at the behest of, and targeted for a specific audience, the MTA's governing Board. Therefore, as will be more fully described, infra., I credit the explanations that the listing of priorities, among other items, was subject to "spin," based on the internal politics of the MTA.

accuracy and, if they have no questions, approve them. Without fail, all managers swore that they had never been instructed to mischaracterize any activities on their reports; had never instructed or encouraged others to mischaracterize any of their time or activities; have never been encouraged to overstate or understate the actual time spent on any activity; nor have they ever given any such instructions to any staff member. Therefore, I credit the consistent, emphatic testimony and averments and find that there was no systematic or deliberate effort to either obfuscate or understate the amount of time spent by MTA employees in various political or other nonchargeable endeavors.

As discussed in the Overview, under the MTA's program budget system, all time and expense information is entered into the MTA's computerized time accounting data base and then allocated in the general ledger, either as an expense or a payroll journal entry, all of which is ultimately reflected in MTA #1. As an element of its prima facie case, the MTA submitted its fiscal year 1991 general ledger, thereby providing a complete financial chronology of its activities. In its case-in-chief, the MTA further submitted its minutes from the Board of Directors and Executive Committee meetings, and all routine publications issued by the Communications Division. Finally, the MTA provided credible evidence concerning its membership numbers and the per-capita basis upon which it based its agency service fee demand.

I consider the testimonial and documentary evidence submitted by the MTA to be sufficient, under the Commission's prevailing guidelines, to meet its prima facie burden concerning the chargeability its programs and the general propriety of its agency service fee demand. See Woburn

Teachers Association, 13 MLC at 1564-65; Milford Teachers Association, 13 MLC at 1576. The MTA's witnesses were subject to intensive and extensive cross-examination, thereby enabling the Charging Parties to explore, among other things, the extent of political activities which took place during the 1990-91 year. It is undisputed that through its probing of the MTA's evidence, the Charging Parties demonstrated errors in the program codes utilized by employees in their time accounting reports in the divisions of Affiliate Services, Communications, Research and Professional Development. (MTA Brief, p. 12-13).[18] Throughout this proceeding, the Charging Parties have alleged that the MTA's entire time-keeping system is riddled with errors and inconsistencies and is demonstrably unreliable. Therefore, since the MTA's entire agency fee demand is based on a program budget model that, in turn, is based on unreliable time and expense allocations, the Charging

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[18] Although the Charging Parties ably scrutinized the MTA's chargeability assertions, they argue, citing the lower court's Lehnert decision, 643 F. Supp. 1306, 1327 (W.D. Mich. 1986), that such probing is a litigation burden that they need not bear. (Charging Parties' Brief, Vol. II, p. 1-3). In the initial Lehnert decision, a judge expressed concern with requiring plaintiffs to cull through unidentified but assumed chargeable expenses in search of discrepancies. Here, I conclude that the MTA has submitted sufficient, detailed evidence to identify its expenses and establish its prima facie of chargability. Therefore, as in discrimination cases, it is reasonable to shift a modest burden of production to the charging parties to challenge the union's proof. In order to challenge the MTA's chargeability assertions, the Charging Parties admitted all employee time and expense reports into the evidentiary record, thereby obviating the practical need to determine whether or not MTA #1 is an appropriate summary document.

Parties argue that the MTA is entitled to little or no agency service fee.

In response, the MTA counters that although the Charging Parties demonstrated instances of political activity coding errors, the integrity of the MTA's entire time accounting system was not undermined. As previously indicated, I credit the managers' consistent testimony that the MTA made no conscious or intentional effort to mischaracterize or diminish its employees' political activities. Moreover, I discern no persistent, tangible error pattern, or any other evidence, that persuades me that employees throughout the MTA were conspiring to conceal their nonchargeable conduct.

In an effort to verify the overall integrity of its time reporting system, and to rebut the Charging Parties' assertions of universal unreliability, the MTA engaged Joel Aronson, a certified public accountant, to conduct a test of the reliability of its time reporting system within the Affiliate Services, Communications Research and Professional Development divisions. The costs of the four divisions included in the engagement constituted over 80% of the costs MTA seeks to charge to the fee payers.

Joel Aronson is a partner in the firm of Alexander, Aronson, Finning, and is an auditor with over 23 years of experience. His professional experience includes reviewing and testing the reliability and validity of accounting systems and procedures and his firm has tested hundreds of organizational time systems.

The legal staff of the MTA and Aronson determined the agreed-upon audit procedure, consistent with the Generally Accepted Auditing Standards (GAAS), to test whether the time accounting system, taken as a whole, is reliable for the purpose of allocating employees' time to

program codes. In this context, a reliable system means that it generates a reflection of the number of employee hours spent under each program and accurately allocates the personnel costs of those hours to each program. Based on his experience, Aronson determined that the MTA time accounting system would be reliable if his test produced an error rate of 5%, plus or minus 2%.

I credit Aronson's unwavering testimony that the MTA imposed no limitations on the scope of the audit other than it be confined to the employees of the Affiliate Services, Communications, Professional Development and Research divisions, which the MTA represented were the focus of the on-going hearing. I find that no limitations were imposed on the design of the audit or on the evidential matter on which Aronson would base his conclusions. I credit Aronson's testimony that the only unique aspect of the engagement was that the MTA asked for additional verification which Aronson would not normally perform in auditing a time accounting system.[19]

It was Aronson's standard practice to test employee allocation of hours to programs by verifying time sheet entries against program descriptions. This was also the standard audit test performed annually by the MTA's auditors. Here, however, the MTA requested that Aronson include the additional step of conducting face-to-face employee interviews as part of his audit engagement, which took the engagement beyond the normal bounds of verifying a time-reporting system.

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[19] Throughout his testimony, Aronson displayed a thoughtful, reflective demeanor and an earnest manner. He was highly attentive to the posed queries and strove to be forthright, precise and comprehensive in his responses. Therefore, I credit his testimony.

Estimating that there were approximately 53,000 entries in the 1990-91 accounting reports of the employees of the divisions of Affiliate Services, Communications, Research and Professional Development, Aronson utilized a statistical formula and determined that his sample size should be 637 entries.[20] A random starting point was selected and every 83rd entry in the time sheets was examined thereafter. For each time sheet entry selected, the program code and employee's activity description were compared to the descriptions and codes used in MTA#1, and an initial determination was made concerning the propriety of the cited code.[21]

Next, employee interviews were undertaken to further verify the reported activity and codes. Whenever possible, interviews were conducted in person, with telephone interviews substituting, when necessary. A memorandum from MTA General Counsel Ann Clarke was circulated to all affected staff, giving the background of the on-going service fee litigation, explaining the nature and purpose of Aronson's engagement and urging the staff's cooperation. Aronson wrote to each staff member, detailing the activity report entries to be tested and asking the individual to submit any corroborating materials to further verify the time entries, such as appointment calendars, diaries, meeting notices, telephone notes, travel and expense records, memos or case files. Clarke wrote directly to former MTA employees, explaining Aronson's engage-

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[20] The statistical formulation of the sample size is the only application of statistics in Aronson's audit engagement.

[21] At hearing, Aronson displayed considerable knowledge about MTA operations and MTA program codes.

ment, urging their cooperation, noting that a "good report" would be a boost to the effort to beat the Charging Parties. After the initial encounter with an MTA employee, Aronson followed up when supplementary documentation or clarification was required. Additionally, letters were sent to individuals from the MTA Legal Department, urging the employees' further cooperation.

Aronson accepted a number of forms of documentation when verifying the accuracy of a tested time sheet entry. Verbal recollection was accepted for 267 of the 637 entries when an employee provided details that demonstrated specific and reliable recollection of the activity. Verbal recollection was also accepted for entries involving general office activities. I credit Aronson's testimony that he applied a "healthy skepticism" in evaluating employees' recollections and evaluated their recollection in light of his knowledge of MTA operations and employee activities. Eighty-six (86) entries were verified based on the face of the activity report -- that is, making sure the recorded activity conformed to an official and appropriate MTA program code -- the normal level of verification in audits of time-accounting systems. Finally, the remaining 284 entries were verified based on specific, relevant documentation.

Next, Aronson traced each entry to determine the accuracy of the data input function of MTA's time accounting system, thereby verifying the accuracy of the database used to allocate payroll and related costs in the general ledger and in MTA #1. Finally, Aronson recalculated all of the entries made by Finance and Accounting to allocate the payroll and related costs, and verified that their entries were accurate.

At the conclusion of his testing, Aronson determined that the employees had committed 24 coding errors and 7 keypunch errors for a total of 4.95% errors in activity entries tested. Aronson formulated the opinion that the error rate was well within the tolerable rate expected and that there is a 95% chance that the true population error rate was equal to 5%, plus or minus a standard deviation of 2%.

The Charging Parties challenge Aronson's conclusions, and dispute the reliability of his tests, on numerous grounds.[22] First, the Charging Parties vigorously contest the MTA legal staff's involvement in the conduct of the audit, asserting that the MTA micromanaged Aronson's engagement by, among other things, conducting a secret letter writing campaign to employees, thereby alerting the employees to the purpose of Aronson's engagement;

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[22] The Charging Parties also renew their hearsay objection to the admission of Aronson's report and testimony. It is overruled. I note that the Antry court faced a similar objection concerning the union's proffer of surveys of its employees' time. The surveys, conducted by union personnel, asked employees to recreate their previous year's activities (in the absence of contemporaneous time records) by reviewing documents and correspondence files and through discussions with office personnel. The surveyed employees then allocated their time among ten categories of activities. The court accepted the surveys, noting that they summarized a huge amount of information, which, if presented through direct testimony, would have lengthened the administrative proceeding. Antry, 522 N.E.2d at 335-339. Here, the MTA employees kept contemporaneous time sheets, which were tested by Aronson. Aronson's opinion and report have a greater indicia of reliability than the Antry surveys, because they were rendered by an independent auditor in full compliance with all governing professional audit standards.

withholding from Aronson the transcript of employees' testimony in this proceeding; and, editing the final Aronson report to the Commission.

Contrary to the Charging Parties' assertions, I do not find that Aronson's professional standards of objectivity or independence were compromised by the legal staff's involvement in his engagement. During the course of the multi-day hearing, I had many opportunities to review employees' time sheets and to learn that, by and large, the MTA professional staff record a sizeable number of weekly work hours. In observing the demeanor and manner of the host of MTA witnesses, I received the distinct impression that many individuals found the instant proceeding aggravating and inordinately time-consuming. Therefore, Aronson's testimony that employees he interviewed expressed similar concerns and considered the agency service fee process to be too time consuming is consistent with my hearing observations. In this context, I credit Clarke and Aronson's consistent testimony, obtained from sequestered witnesses, that her letters simply urged busy people to spend time on the audit engagement, to participate in the interviews, and, to take the time to search their files for relevant documentation. Rather than a conspiracy to manufacture evidence, as suggested by the Charging Parties, I regard the correspondence as an effort to "nudge" busy employees into cooperating with the audit engagement.

The record here fails to demonstrate any harm caused by Clarke's letter writing. Fifty five (55) employees were interviewed, throughout four divisions of the MTA. As previously stated, I credit Aronson's assertion that he brought a "healthy skepticism" to bear on his task. No pattern of deception was noted by Aronson. Likewise, I

have found none. Instead, at least one employee candidly recounted information against the MTA's interest to Aronson, indicating that he did not know what code to use when he was reading work related papers. Although he was unaware of Clarke's letters while he was conducting his engagement, I credit Aronson's testimony that nothing in the correspondence causes him to withdraw or alter his opinion concerning the reliability of the audit. Finally, I do not consider Clarke's editorial suggestions to materially affect the independence or reliability of Aronson's final report. In sum, I conclude that Aronson's audit conformed to the professional standards governing his profession.

Nonetheless, the Charging Parties raise concerns about the technical methodology used by Aronson. Relying on expert statistical testimony, the Charging Parties contend that Aronson's report was deficient because, in essence, he examined a complex system using a simplistic test. The Charging Parties assert that a valid test must involve stratifying the MTA population to test whether there were different time recording error rates among different MTA employees and divisions, different rates at different times of the year, and different rates of error among employees at different salary levels.

Contrary to the Charging Parties' assertions, however, I do not consider the absence of stratification to be a flaw in Aronson's test. The study, as conducted, was adequate to render an opinion concerning the reliability of the time-keeping system as a whole.[23] Moreover, because the

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[23] Likewise, I discount the criticisms that Aronson's study is flawed because he made assumptions of constancy and independence. I credit Aronson's averments that he was aware of these issues

test produced an error rate under the 7% acceptable level set at the beginning of the test, further testing, which may have included stratification to explain any anomalies, was unnecessary. Finally, while Aronson is criticized for "over-sampling" a portion of the MTA employee population, the Charging Parties' expert conceded that the alleged rror was only a "modest technical nit." Moreover, I am persuaded that there is no significant difference in the allocation error rate of the group of MTA employees sampled twice.[24]

Next, the Charging Parties argue that the verification employed by Aronson in his testing was inadequate. The Charging Parties appear to assert that a time-keeping system test must involve independent source verification to ascertain, as near as possible, the "gold standard" or "ground truth" for the reported activity. For example, to verify an employee's "meeting" time entry, the employee should be asked about the meeting. Then, the meeting's minutes and any other written material must be checked and interviews must be conducted with other attendees, who would be asked to confirm the employee's meeting attendance. I consider the level of proof deemed necessary by the Charging Parties' expert to verify any single activity to be unrealistic and impractical. While both Aronson and the Charging Parties' expert statistician prefer verifying a time entry through the use of corroborating documentation, rather then based on the individ-

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and that his sample size and design were sufficient to alert him to any problems with such assumptions. No information came to his attention which cast doubt upon the assumptions.

[24] In this regard, I credit Aronson's supplemental affidavit averments.

ual's recollection, or by the face of the time sheet itself, it is undisputed that governing auditing standards and practice permit verification of a time entry by comparing the reported activity with program descriptions.

Aronson is criticized for permitting an excessive level of subjectivity in verifying employee's allocation of time to various programs. The Charging Parties object to the notion that several people attending the same MTA meeting could validly charge the meeting to several different program codes, arguing that the subject matter of any meeting should govern the assignment of the program code. (Charging Parties' Reply Brief, p. 38). The MTA counters, asserting that employees attend meetings for different purposes and that it is appropriate to charge meeting time according to its purpose. The MTA also points out that its meetings often cover a number of agenda items, and employees often allocate their time to the item relevant to them. (MTA Reply Brief, p.26-27). When considering an Affiliate Services staff meeting, for example, Aronson found it appropriate for attending employees to charge their time to the program that reflects discussion "which directly impacts what that employee is doing or working on." (Transcript p. 7445). The MTA's corroborating expert, Paul Charnetzki concurred, averring: "There are bound to be difficulties in describing and pigeon-holing the activities of service industry employees. You could have two different employees at the same meeting whose attendance at the meeting was related to providing different services." (Charnetzki Affidavit, p. 9-10). Therefore, I am persuaded that, in some instances, it is appropriate for employees attending the same meeting or function to charge their time to varying program codes. I concur with the MTA's assertion

that some level of subjectivity is inevitable and appropriate in a union's time accounting system. The MTA's illustration is on point: a union employee's objective, while exploring or threatening litigation, may be settling a contract. (MTA Reply Brief, p. 26). In such a situation, a variety of program codes may appropriately describe the employee's activity.

Finally, the Charging Parties challenge the error rate established by Aronson, arguing that a higher number of errors or potential errors were demonstrated through cross-examination. I have carefully reviewed each of the examples cited by the Charging Parties (Brief, Vol. II, p.1-225) and am persuaded that two further errors were committed, entry number 177 for Everett Lahey and number 69 for Carol Wasserloos.[25] Therefore, 26 coding errors were identified in Aronson's sample, for an error rate of 5.27%.[26]

In sum, I am persuaded that the MTA has met its burden of proving that, overall, the MTA time-keeping system is reliable. Nonetheless, the Charging Parties have demonstrated errors in coding and allocating time, in

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[25] I do not accept the Charging Parties' assumption that if a MTA employee committed a time allocation error, or if Aronson erroneously verified an errant time charge, all other time entries from that individual are necessarily suspect.

[26] Percentage derived from the following formula: 26 time allocation errors + 7 key punch error divided by 626 (the final size of Aronson's sample). Moreover, 44 errors would need to be identified to meet Aronson's 7% error rate threshold for querying the overall system's reliability. Additionally, Charnetzki indicated that, in his experience, a system of this nature could tolerate an error rate of ten to fifteen percent and remain reliable.

various divisions, in conjunction with the MTA's 1990-1991 political campaigns. Therefore, before I analyze each division, I first review the broad outlines of the MTA's political conduct for the year in question.

IV. Outline of MTA's 1990-1991 Political Campaigns

The MTA's Division of Governmental Services is designed to be primarily responsible for the organization's legislative, electoral and political activities. The descriptions contained within Governmental Services' budget programs and subprograms indicate that it lobbies the legislative and executive branches of the state government, provides assistance to the NEA in lobbying at the federal level, coordinates electoral activities of the membership and provides administrative support for the activity of the MTA's political action committee, VOTE. During 1990-1991, the Governmental Services Division had a budget that was roughly comparable in amount to that of the Legal Services Division.

The campaign to defeat Question-3 (Q-3) was the MTA's most significant area of political activity during 1990-1991. Sponsored by the Citizens for Limited Taxation (CLT), who earlier had masterminded the Proposition 2½ referendum, Q-3 was another ballot question designed to roll back taxes and fees. If enacted, the MTA believed that Q-3 would have greatly reduced the funding available for governmental functions, including education at the primary, secondary and higher education levels. Not only would Q-3 have reduced the funds available from the state, but it may also have reduced municipalities' ability to raise funds to supplement declining local aid. Therefore, the MTA was con-

cerned about the potential impact of Q-3 in reversing collect bargaining gains and threatening the job security of its bargaining unit members. The fall 1990 campaign to defeat Q-3 became a MTA priority and MTA staff were encouraged to work on the campaign.

The MTA's campaign was operated in conjunction with a state-wide coalition of public sector unions and human services advocates, organized by the Tax Equity Alliance of Massachusetts (TEAM). The MTA was both a member and a contributor to TEAM. The anti-Question 3 coalition called itself the Campaign for Massachusetts Future (CMF). TEAM operated its own Q-3 campaign through "home teams," groups of local activists in each community. In addition, each individual organization within the CMF coalition was urged to run an internal campaign to persuade its own membership to vote against Q-3.

TEAM's office was CMF's headquarters and during the Q-3 campaign four MTA employees worked at the TEAM office. The MTA paid the salaries of Linda Kaminski of Legal Services; Tobey Conlin of Governance; Arthur Pippo of Affiliate Services; and Maria Plati of Communications while they worked with TEAM. Arthur Pippo had a particularly long tenure with TEAM, serving as regional coordinator for TEAM's campaign from September 3 through election day, November 6, 1990. MTA also provided printing and mailing services to TEAM and shared the names of its volunteers and activists.

Robert Bonazzi, the Director of Affiliate Services, was responsible for coordinating the MTA's Q-3 campaign. Bonazzi was assisted by an Anti-CLT Planning Team, comprised of staff from various divisions and consisting of, in addition to Bonazzi, Arline Isaacson and Jack

Pacheco of the Governmental Services Division; Everett Lahey, a Regional Manager from Affiliate Services; MTA Vice-President Robert Murphy; Arthur Pippo; and Jack Polidori and Steve Wollmer from the Communications Division. Two further members of the Communications Division, Maria Plati and Penny Schwartz, later joined the group. The Anti-CLT Planning Team met regularly throughout the campaign and continued to meet in an attempt to translate the interest generated by the campaign into a permanent grass roots political network.

In April 1990, Robert Murphy, Vice-President of the MTA, envisioned a community based political network of activists to support and improve education, which he dubbed "Operation Reveille." Reveille was adopted by the MTA Board and was projected to have a coordinator in every state senatorial district, an organizer in each community and include many individual community activists. The Q-3 campaign was an impetus to translate the theoretical blueprint authored by Murphy into an extant network of political activists.[27] As originally envisioned, the Q-3 campaign was to have two phases: Phase I to educate MTA members about the ballot initiative, determine how members would be voting on Q-3 and to identify members who would be willing to serve on the campaign; and, Phase II to persuade undecided MTA members to vote "No" and to make sure that individuals opposed to Q-3 would actually go vote.

MTA staff in the Affiliate Services, Communications, Governmental and Professional Development Divisions

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[27] I credit Strecker's averment that "prior to the beginning of the Q-3 campaign, Operation Reveille existed only on paper." (Strecker Affidavit p. 23).

were introduced to the Q-3 campaign at a meeting in Marlborough on July 31, 1990. The MTA's local leaders received their campaign introduction at the MTA's Summer Leadership Conference at Williamstown in August. MTA staff members participated in the Q-3 leadership training at Williamstown and, in preparation for these training sessions, attended meetings on August 9 and 13, 1990. One day of the week-long Williamstown conference was devoted to the Q-3 campaign. "Beat CLT Day" took place on Tuesday, August 14, 1990.

During the week of August 27, 1990, local presidents attended regional meetings with the field staff for training in the elements of the Q-3 campaign. Campaign material, much of it produced by the Communications Division, was distributed. At these meetings, the MTA made its first attempt to recruit Reveille coordinators by asking local presidents to recommend candidates.

Central to the initial phase of the campaign was a card survey designed to be completed by all 63,000 or so employees represented by MTA affiliates. The card asked the individual how they planned to vote on Q-3 and whether they would be willing to donate two hours of their time for various campaign activities. The cards were distributed to the membership and completed cards were returned to MTA headquarters, where they were "scanned" using specialized equipment, thereby enabling response reports to be generated. The periodic response reports were distributed to each local MTA affiliate, and to the field staff person (also known as a UniServ representative) regularly assigned to the local. Throughout September, Bonazzi issued correspondence urging local presidents and field staff to do whatever they could to ensure the return of completed survey cards. By the

beginning of October, about forty thousand (40,000) cards were returned.

A high proportion of the returned survey cards indicated that the respondents already intended to oppose Q-3. However, the MTA was unable to recruit Reveille coordinators for each Massachusetts community. Nonetheless, the MTA used the available volunteer local coordinators to at least partially execute the second phase of the Q-3 campaign. In late September, three training sessions were held for the coordinators, who later were requested to canvass, by telephone, those MTA employees who had not returned their cards, to mail campaign postcards to friends in the community, and, to make phone calls to help get out the vote. In the meantime, members were encouraged to display lawn signs and bumper stickers urging voting "No" on Q-3. MTA President Bacon had public debates in opposition to the initiative and a flyer was prepared for use at any public gathering, outlining opposition to the measure.

Question-3 was defeated at the polls on election day, November 6, 1990. Thereafter, the MTA held several regional "debriefing" meetings to allow local officers and staff to analyze the campaign. Some locals threw victory, "Q-3 Defeat," parties.

The MTA attempted to maintain the Operation Reveille momentum initiated by the Q-3 campaign. I credit the consistent testimony that, after the Q-3 campaign, despite the efforts of the MTA leadership, there was little grass roots support for an on-going network of local political activists. Apparently, few of the Q-3 coordinators wanted to remain part of the program. Nonetheless, the Anti-CLT Planning Committee was renamed the Reveille Planning Group and met on January 14 and 29 and again

on February 5 and 13, 1991. When Vice-President Murphy wrote to local presidents to galvanize interest in Reveille, he got no response. The Reveille training that was scheduled for local presidents and coordinators in February and March 1991 never took place. As late as mid-March, Bonazzi was still searching for a means to get the program going. Finally, Gerry Dlouhy, Regional Manager for the Southeast Region, made an effort to recruit Reveille coordinators at a meeting in connection with the Penny on the Sales Tax campaign. At that point, for all intents and purposes, Reveille was defunct.[28]

In December 1990, in its Campaign for Opportunity, the MTA sought legislative approval for an amendment to the Massachusetts constitution that would have guaranteed equal educational opportunity for all elementary and secondary school students. However, the constitutional convention (ConCon), a joint meeting of the Massachusetts House and Senate on December 28, failed to take up the issue and it died. A follow-up meeting on January 28, 1991, attended by the regional managers, Edward Sullivan, Ann Clarke, Director of Legal Services and Arline Isaacson, marked the end of the MTA's constitutional amendment initiative.

On March 22, 1991 the MTA Board voted to launch "A Penny for the Future," a campaign to increase the 5% sales tax to 6%, with the increase earmarked to fund public education. In April 1991, the MTA retained the

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[28] I credit the consistent testimony of the sequestered witnesses concerning the fundamental lack of interest and active participation in Operation Reveille. I find it credible that the MTA would continue to advance this idea, however, knowing that it was the "pet project" of the Vice-President of the organization. (Transcript p. 5378).

political consulting firm of Marttila and Kiley to test public support for the concept and the favorable results were unveiled at a May 9, 1991 press conference. In May, the Board authorized an expenditure of $300,000 to fund the campaign, with a portion of the total coming from the Affiliate Services Membership Compensation Account.

Central elements to the Penny campaign were a direct mail piece to all MTA members and a postcard campaign directed at the legislature and the Governor. A campaign goal was to have each MTA member send three postcards in support of the campaign to the Governor, a senator and a representative. From April 29 through May 2, regional meetings were held to explain the campaign to local presidents, with a corresponding invitation extended to the field staff. Bonazzi urged the field staff to generate local interest in the Penny campaign, but his urgings met mixed results. The Penny campaign concluded on May 22, 1991 when the House of Representatives rejected the proposal.

Through school year 1990-1991, the MTA maintained a Statewide Crisis Team. Apparently reacting to the prevailing fiscal climate, the May 1990 Annual Meeting authorized President Bacon to call a statewide strike. The Statewide Crisis Team, consisting of the Executive Committee, the directors of Affiliate Services; Communications; Governmental Services; the General Counsel; the regional managers and the director of Higher Education, was formed to consider, and coordinate, such an action. While no strike was ever called, the concept resurfaced periodically throughout the year. In all, the Statewide Crisis Team had four meetings: July 26, December 11, January 11 and March 22.

A Staff Crisis Team also met periodically during the year, providing Bonazzi with advice on current issues and crises affecting the membership. Despite the similarity in title, however, the only connection between the Staff Crisis Team and the Statewide Crisis team was Bonazzi's membership. In addition to Bonazzi, the Staff Crisis Team consisted of field representatives Richard Brosnihan, John Cogan, Ralph Devlin, Ed Kimball, Frank Moynihan, Joe Murphy, John Reilly, Dick Rivers, George Shea and Ron Suga. Moynihan's participation ceased in mid-year. The Staff Crisis Team met on July 9, September 18, October 3, November 1, January 10 and March 13.

Governor William Weld took office in January 1991, proposing to alleviate the state's fiscal crisis by dramatically cutting state expenditures, including cuts in local aid, and through savings achieved by furloughing state employees. The enacted furlough affected the MTA's higher education members. Moreover, the Governor's budget proposal for FY 1992 called for another $360 million in cuts in funding for public K-12 and higher education, and a shift of a portion of teacher pension costs from the state to municipalities. House and Senate debates on the 1992 budget began in late May and continued thereafter.

MTA officers Bacon and Murphy, Executive Director-Treasurer Sullivan and the Governmental Division were directly involved in this budget debate and, along with Bonazzi and certain Communications staff members, strove to enlist the assistance of the local leaders. Since the outcome of the budget debate would affect, among other things, whether school layoffs would take place in the spring, they were monitored and discussed by Affiliate Services staff members.

I now turn to a detailed analysis of each of the divisions within the MTA, beginning with the Division of Affiliate Services.

V. DIVISION OF AFFILIATE SERVICES

Overview

Affiliate Services is the largest and costliest division within the MTA. In 1990-1991 the division had 58 full-time employees, with each of the six regional offices staffed by a manager, six or seven full-time field or UniServ representatives, and two secretaries. The division also employed a number of part-time field representatives in each region. Robert Bonazzi, the division director, worked in the Boston headquarters with an administrator, Janet Strecker, an organizer, Arthur Pippo, and a secretary. The higher education office, also located in Boston, consisted of a manager, five field representatives, and a secretary. The field representatives are the front line of contact between the MTA, its local affiliates and its membership. Each UniServ representative provides service to a cluster of bargaining units (which can range in number from two to thirty), containing 1,500 to 2,000 members.

Unlike other divisions, each of which has a single budget account prefix, Affiliate Services has eight: one for each regional office and Pittsfield (MA1-6), one for higher education (MA7), and one for the Boston office (MA8). Affiliate Services costs are allocated in one of three ways: 1) General costs[29] (meaning employees' salaries, benefits and expense reimbursement such as meals and miles)

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[29] Referred to in the MTA's Brief as personnel costs.

incurred within each office remain within the office's accounts and are allocated to subprograms; 2) Many of each office's direct costs (rent, telephone, equipment, supplies, cleaning, printing and mailing, dues, subscriptions) also come from its own accounts, allocated to Program 5.0; 3) Other direct costs are paid from the Boston office account (MA8) and, with a few exceptions, are allocated only to major programs, not subprograms.

In general, the work of the Affiliate Services staff is related to the negotiation and maintenance of collective bargaining agreements between the local affiliate and its employer. It is uncontroverted that the economic climate in 1990-1991 led to a variety of collective bargaining difficulties. New England was in a recession and cities and municipalities received reduced levels of state aid. The impact was felt by educators, with 57 school districts, and all higher education employees, returning to work in September 1990 without contracts. Reaching successor collective bargaining agreements could be an arduous and protracted process.

At the elementary and secondary school levels, a pattern of school committees offering zero percentage increases developed. Additionally, some school committees proposed -- and obtained -- rollbacks of salary increases that had been negotiated in previous years. In some instances, when the local union pressed for salary increases, a school committee countered with proposed layoffs. Layoffs inevitably increased the workload of the assigned UniServ representatives, who, among things, assumed responsibility for reviewing and monitoring the compiled seniority lists. Moreover, the field representatives coped with the conflicts that layoffs invariably caused within the local.

Health insurance coverage also emerged as a significant bargaining issue. Municipal health insurance costs were soaring. In response, employers were seeking proposed increases in employee contributions. Additionally, Blue Cross, a major health care provider, began declining to provide coverage to municipalities in which its plans were undersubscribed. The withdrawal of Blue Cross coverage could create a furor among the local educators, thereby increasing the workload of their field representatives. The field staff needed, and received, specialized training to undertake the increasingly complex health insurance negotiations.

In many locals, the local union leadership was weak, further increasing the responsibilities of the assigned field representatives. As a result of Proposition 2½, educators often had either very high or very low seniority. The middle seniority range, from which the Union leadership often emerges, had been laid off, requiring the senior leaders to retain their leadership positions. Reenergizing the leadership and revitalizing the locals became a staff priority.[30]

The bargaining climate was also unsettled in higher education in 1990-1991. All six higher education contracts expired on June 30, 1989 and the parties were still negotiating in September 1990. The concern among higher education staff was to educate new contracts before a new administration took office. New higher education contracts, for all six bargaining units, were finally executed in November and December 1990. The MTA then attempted to get out-going Governor Dukakis

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[30] In this regard, I credit the consistent testimony and averments of managers Coyle, Lahey, Flynn and Burgess.

to approve the raises contained in the agreements and submit them to the Legislature for final approval. Governor Dukakis approved the increases, but did not submit the request for funding before he left office. In February, newly inaugurated Governor Weld announced that he would not approve the increases, thereby returning the whole subject of wages to the parties for further bargaining.

Meanwhile, in November 1990, the fiscal crisis provision of the faculty collective bargaining agreement was invoked at the University of Massachusetts, an action that was a precursor to layoffs. While layoffs were averted when the University withdrew its fiscal crisis declaration in December, higher education employees were nonetheless subject to a furlough in the spring of 1991. The furloughs were of two to fifteen work days in duration, depending on an employee's salary level. Some employees could take their furloughs in the form of unpaid days off, but employees deemed critical and essential were required to work without pay. Many of the MTA's higher education unit members were deemed critical and essential, and their unpaid labor was the subject of filed grievances. In addition, the Division of Legal Services filed suit to challenge the perceived unconstitutional impairment of the collective bargaining agreements. As a result of their protracted successor contract predicament, the higher education staff were more involved with the state legislature than other regional office staff.[31]

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[31] Charging Party Conner suggests that his position is substantially different from the elementary and secondary school employees represented by the MTA and, accordingly, the Union should charge

It is in this context that the activities of the Affiliate Services staff must be analyzed and evaluated. I am persuaded that the Affiliate Services staff, while involved in the Question-3 campaign during the fall of 1990, continued to provide collective bargaining services and support throughout the campaign. The two quarterly division reports covering the campaign period demonstrate the on-going collective bargaining endeavors including, among other items, negotiating successor agreements, grievance processing and arbitration activity, budget concerns and staff cuts, a myriad of health insurance concerns, work place health and safety problems and even dealing with local discontent with the MTA[32] Therefore, in light of the quarterly reports, the employees' time sheets and the consistent witness testimony, I conclude that the Question-3 campaign did not pre-empt the collective bargaining and contract maintenance responsibilities of the Affiliate Services Staff.[33]

However, the Affiliate Services field staff did perform several functions in the Question-3 campaign. Staff

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him only for activities that specifically benefit university professors. However, the record is replete with examples of MTA activity on behalf of its higher education bargaining unit members. Moreover, Conner's argument that fee charges must be directly incurred on behalf of an individual's bargaining unit was rejected in Lehnert. 500 U.S. at 524.

[32] Moreover, I credit the general veracity of the collective bargaining information contained in the quarterly report, as it compares favorably with notations contained within the affected staffs' pertinent daily activity reports.

[33] The testimony of Burgess and Strecker are most instructive in this regard.

members sometimes provided campaign training for local association leaders. Field staff were an element in the MTA's delivery scheme, transporting campaign materials when the local leadership were unable to do so. Field staff made campaign related calls to local leaders, to both monitor and encourage campaign participation. Staff also manned the polls on election day. However, an extensive review of the field staffs' time sheets for the duration of the campaign period largely corroborates the consistent testimony that the staff's campaign involvement was finite. The time sheets reveal entries clearly delineated as "Q-3", "CLT", "lobbying" or "political activity" during the period in question, charged to the appropriate political activity code, 4.2. A relatively uniform pattern of field staff activity and time charges is apparent: small blocks of Q-3 time (often 1 or ½ hour intervals) are charged to program 4.2, describing work concerning various locals from a central location, usually the employee's home or regional office. The time sheet entries are consistent with the testimony that staff made follow-up campaign telephone calls. Other 4.2 charges include local political or Q-3 training, at specific locals. While it is undisputed that coding errors occurred concerning campaign meetings, I am not persuaded that the overall Q-3 time allocations are unreliable. Instead, the time sheets reveal that, by and large, MTA affiliate services field staff segregated, recorded, and, appropriately coded Question-3 field work.[34]

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[34] I address the Charging Parties' contention that the limited nature of the field staff's involvement in the campaign is incredible, in light of the exhortations for great effort from the Boston officer in general, and Affiliate Services Director Bonazzi in particular, infra.

Contrary to the Charging Parties' position, I am not persuaded that the entire Affiliate Services portion of the agency service fee is "infected" by the division's political conduct. Instead, I consider the record sufficient to demonstrate a prima facie case of chargeable activity within each Affiliate Service program area. Further, it is possible to identify and segregate instances of wholly political activity. Therefore, I will delete time allocation errors from the demonstrated Affiliate Service chargeable costs.[35]

Netted Income

The MTA receives revenue from a number of sources other than dues. In general, the MTA receives money from: the NEA, rental property, ESC management fees, outside customers of its services, and through some fund-raising.

Accounting Manager Anzivino testified that, in general, the total expenses for each division listed in MTA #1 are net expenses, that is, they reflect expenses after subtracting revenues, including NEA revenues. The evidence adduced during the hearing, however, demonstrated that this was not consistently true.

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[35] The record contains a calculation of the "value per hour" for each program and subprogram in MTA divisions and, within the Affiliate Service division, for every regional office. This figure was derived by averaging the salaries and benefits of all personnel in each division and dividing the costs by the number of hours spent in each program and subprogram area by the number of hours spent by persons who kept time records. Since support staff costs are built into the professional staff's hourly rate, the value per hour figure for each division is higher that any division employee's hourly rate. I consider these calculations reliable and determine that a value per hour figure is a reasonable and appropriate accounting method.

The MTA argues that it was in error to net NEA revenues from total costs in MTA #1, because netting out revenues of any sort results in an understatement the true chargeable costs of negotiating and administering a collective bargaining agreement and of settling grievances and disputes, as well as the costs of activities reasonably employed to effectuate the duties of the Union as exclusive representative of the employees in the bargaining unit. Moreover, the Union cites Brown and Chicopee Firefighters for the proposition that expenditures of NEA funds must be examined, and charged, at the point of expenditure. Brown, 14 MLC at 1252 n.8. (MTA Brief, p. 37).

The Charging Parties object to the inclusion of the NEA revenue, as well as all other previously "netted" income, arguing that the Commission's Brown discussion does not mandate such a result and that inclusion of the outside revenues results in "double-billing" the nonmembers. The Charging Parties interpret Brown to mean that the NEA has to prove how the MTA spends any grant money, to determine whether it is chargeable or not. "Unnetting" is considered the same as double-billing because the MTA and the NEA may both charge for the same monetary grant. (Reply Brief, p.21, 40-41).

I am not persuaded that permitting the MTA to resort previously netted revenues will result in double-billing here, since the terms of the fee to be paid to the NEA are set forth in Joint Exhibit #1, the master settlement agreement. I find no record evidence that the NEA is charging for the challenged expenditures. Instead, both parties have agreed that the NEA portion of the fee will be "ten percentage points less than the final chargeable

percentage determined for the MTA" for each fiscal year at issue. (Joint Exhibit #1).

I permit the MTA to restore the previously netted income for a number of reasons. First, since inconsistencies in the treatment of outside sources of revenue were demonstrated at hearing, and specific evidence was adduced concerning Affiliate Service funds, I do not perceive the Charging Parties to be unduly prejudiced by their inclusion. Although the MTA treated revenues inconsistently in its demand, I do not consider such revenue information to be the type of material that would either cause, encourage or discourage a nonmember to file a fee challenge. Thus, the revenue restoration does not implicate any Hudson issues. Finally, I am persuaded that including the NEA income here provides a more complete and accurate picture of the MTA's overall costs for the year in question.

The only external source of revenue for Affiliate Services was the NEA. Of the overall NEA funds received by the division, $40,615 was netted from the totals in MTA #1, from programs 2.0 and 5.0. However, the NEA revenue amounts are included within the program 2.0 and 5.0 summary of program charges appended to Anzivino's Affidavit at Tab A. The totals restoring the NEA revenue form the basis of my analysis of each program area.

Activities of Affiliate Services in 1990-1991

Program 1.0: Contract Negotiations.

It is beyond dispute that nonmembers may be charged their share of the full costs of collective bargaining, contract administration and grievance adjustment. Ellis, 466 U.S. at 448; Abood, 431 U.S. at 225-226; Greenfield, 385 Mass. at 78.

(a) General costs of Program 1.0

Program 1.1: Preparation for bargaining.

Activities included within this subprogram designation are selecting local bargaining teams, surveying the membership about bargaining concerns, gathering comparative data from other communities, meeting with the bargaining team, assembling the asking package and scheduling bargaining sessions. In Boston, it included time spent on the Member Compensation Project and the annual Collective Bargaining Conference, held on March 16, 1991. The objective of the Member Compensation Project was to investigate avenues and formulate mechanisms for improving the compensation and benefits of school employees. Affiliate Services staff made presentations at the 1991 Collective Bargaining Conference, an event attended by approximately 300 bargaining unit members. The focus of the conference was collective bargaining in hard times, including the external and internal stresses on local associations and bargaining suggestions for difficult fiscal situations.

General costs in 1.1[36]	$1,270,402
Misallocated nonchargeable costs[37]	$ 10,395

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[36] Except where noted to the contrary, I rely on the information contained within Anzivino's affidavit.

[37] Certain staff activities were misallocated to various programs throughout the division, including 1.1. The costs of these hours, derived from a review of the Strecker's affidavit, charts and the corresponding time records, has been calculated, by subprogram, using the supplied "value per hour" figures. The Program 1.1 misallocation figure includes Lahey's time on 8/7/90, referred to in paragraph 8 of Strecker's supplemental affidavit.

Chargeable costs of 1.1 $1,260,007

Program 1.2: At-table negotiations.

All time spent at the bargaining table as a spokesperson or a consultant are contained within this subprogram. No Boston divisional staff time was charged to this area.

General costs in 1.2 $390,735

Chargeable costs of 1.2 $390,735

Program 1.3: Training for bargaining.

The presentation and planning of the contract maintenance, negotiations and higher education tracks at the Summer Leadership Conference in Williamstown are contained within this subprogram. Approximately 1,000 people attended, including local association leaders, MTA staff, the Board of Directors, MTA officers and presenters. The conference is organized into "tracks" consisting of various presentations and workshops on a selected subject. The conference also features social and recreational activities and staff were encouraged to attend, even when they were not presenting a workshop, in order to interact with the local leaders with whom they would be working during the up-coming school year. One day of the conference was devoted to "Beat CLT Day." Therefore, I have deleted the value of any staff Question-3 presenters' or trainers' time allocated to any program other than 4.2. Except for trainers or presenters, I have not adjusted staff time for "Beat CLT Day," because I credit the testimony that general conference attendance is a valuable opportunity to informally network with the local leaders and other staff members, to discuss pending issues and to be available for either formal or informal representational work.

Program 1.3 also covered aspects of the annual Statewide Collective Bargaining Conference, discussed above.

General Costs in 1.3	$141,959[38]
Misallocated nonchargeable costs	$ 3,883
Chargeable costs in 1.3	$138,076

Program 1.4: Bargaining Crises.[39]

A local association is deemed to be in crisis when bargaining has stalled and concerted activities are considered necessary to revive the negotiations. Crisis bargaining activities may involve informational picketing, leafletting, lawful demonstrations, work-to-rule actions, and, occasionally, strikes. Many local bargaining situations reached the crisis stage in 1990-1991 (e.g., Blackstone-Millville, Bay Path, Milton, Greater Lowell, Haverhill, Medford, Rockport, Saugus, Wakefield, Whittier and Winchester). However, only one strike occurred, in Winchester.

In a bargaining crisis, additional Affiliate Services staff are assigned to the locals, often assisting in the

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[38] The subprogram 1.3 totals contained in Anzivino's affidavit, Tab A, contain $151,461 in direct charges, billed to the Boston (MA8) account and detailed in the MTA's General Ledger, pages 639-641. I have separately considered directly billed cost items, including those listed under the general 1.0 heading in Anzivino's chart. Therefore, the 1.3 direct costs have been deleted.

[39] The direct costs associated with bargaining crises are contained in a separate Collective Bargaining/Crisis account, discussed infra.

formation of a crisis team and in establishing a visible crisis headquarters. A crisis headquarters provides a tangible symbol to the community that, from the Union's perspective, the bargaining situation is becoming intense. In most instances, a crisis situation does not lead to an unlawful strike. However, in Watertown and Winchester it did.

In November 1987, the Watertown Teachers Association (WTA) and the Watertown School Committee began to negotiate for a successor to their 1985-1988 contract. In April 1988, the parties reached a tentative agreement for a one-year contract, which the WTA membership rejected. In September 1988 the WTA formed a new negotiating team, sought the advice of MTA staff and began bargaining at monthly or bi-weekly meetings.

WTA members were dissatisfied with the course of negotiations and suggested that a strike should occur. Instead, the WTA pursued lawful concerted activities, such as publicity and working-to-rule, while continuing bargaining. From the fall of 1988 until April 23, 1989, the WTA sponsored of variety of activities in connection with the negotiations' crisis, including: membership meetings, held in rented halls, to discuss the on-going bargaining and consider various responses to the crisis; hand-delivery of two informational leaflets concerning negotiations to all Watertown homes, neither of which referred to or threatened a strike; informational picketing during non-work time; and, a work-to-rule from February until April 23, 1989. With the assistance of MTA staff, the WTA set up a Crisis Center, rent free, at a Communication Workers of America union hall. The WTA assumed the cost of the crisis center's telephone.

The membership voted to strike on April 23, 1989 and, from April 24 through April 30, 1989, the WTA and its members engaged in a withholding of services. The WTA and the School Committee continued to negotiate throughout the strike. The parties reached a tentative agreement, which the membership ratified. On May 2, 1989, the membership voted to return to work. No personnel costs associated with the 1989 Watertown strike were incurred during 1990-1991. However, a request for funds from the Crisis account was processed during the year at issue, which will be discussed in the direct cost analysis, infra.

In Winchester, an unlawful work stoppage occurred during 1990-1991. The Winchester Education Association (WEA) and the Winchester School Committee began negotiating for a successor to their 1989-90 contract in November 1989. On May 15, 1990, the WEA formed an Action Committee to consider their options, which included various kinds of publicity concerning the collective bargaining situation, demonstrating at School Committee meetings, a work-to-rule, and a withholding of services. The record demonstrates that the Action Committee was active during most of the 1990-91 school year.

In or around November 1990, the parties reached a tentative agreement that was contingent upon funding by the Winchester Town Meeting. On November 26, the Town Meeting voted against funding the agreement, a result, the WEA believed, of the School Committee's lack of vigorous support for the agreement. A Special Town Meeting was held on November 29, but the WEA was unsuccessful in its attempt to address the earlier vote.

On November 30, 1990, 199 of the approximately 215 Winchester teachers called in sick for one day. I

credit the testimony that the decision to engage in concerted action was made by the membership of the WEA, with no assistance from the MTA. The Commission concluded that the WEA, and its membership, had engaged in an unlawful withholding of services.

After the sick-out, the parties resumed bargaining. Although the Action Committee continued to function, there was no further withholding of services. Instead, the WEA focused on ensuring that the Town Meeting would fund any new agreement.

From June 1990 through February 1991, the WEA and its Action Committee engaged in and sponsored a variety of activities precipitated by the collective bargaining situation. The crisis activities included distributing informational newsletters, flyers and memos to the membership, the bargaining team, members of the Action Committee and the general population of Winchester. None of the material either concerned or advocated the sick-out or any other withholding of services. The WEA, and its Action Committee, sponsored numerous meetings, in rented halls. At these meetings, the WEA discussed the on-going negotiations and considered various responses to the crisis. While the sick-out was admittedly discussed, I credit the averment that no formal vote was ever taken. The WEA and its members engaged in informational picketing and demonstrations during non-work time. There was no picketing or marching during the sick-out. The parties eventually reached a second agreement, which was funded.

The MTA correctly cites Lehnert for the proposition that while the costs of an unlawful strike are not chargeable to nonmembers, the costs of preparations leading up to a strike are fully chargeable, because such expenses

"are substantively indistinguishable from those appurtenant to collective bargaining negotiations." Lehnert 500 U.S. at 532. Like the Lehnert court, I find that, in the context of on-going negotiations, the establishment of a crisis center, and the use of other tactical activities, such as informational picketing and working-to-rule serve to apply pressure upon, and influence the conduct of, bargaining. Therefore, I consider the allocation of staff time to pre-strike, and/or post-strike crisis activities, like those illustrated in the Winchester situation, to be reasonably incurred in the role as exclusive bargaining representative and fully chargeable.

I am not persuaded, however, that the 1990-1991 meetings of the Statewide Crisis Committee concerning a state-wide strike are chargeable under the Lehnert rationale. The record indicates that the concept for the state-wide strike was endorsed at the 1990 Annual Meeting in reaction, at least in part, to the economic climate for education in the Commonwealth. A clear objective of any state-wide strike was to publicize the financial condition of education, and the corresponding resolve of educators, simultaneously throughout the state, thereby raising the public profile of the issue. While such a concerted activity may indirectly influence bargaining in the approximately one-third of all collective bargaining agreements under active negotiation at any point in time, I consider the primary purpose of the contemplated concerted action to be more akin to a large scale public relations or lobbying endeavor. Because the conduct of a state-wide strike was not sufficiently correlated to influencing on-going negotiations, the staff time spent in connection with four meetings of the State-Wide Crisis

Team is nonchargeable.[40] Therefore, the value of the meeting time has been deleted from chargeable costs.

Additionally, I am persuaded that higher education staff time spent on April 17 and 18, in conjunction with the concerted activities of the UMass Amherst faculty, is nonchargeable. The UMass Amherst faculty engaged in an April 17 and 18 "No Business as Usual" protest concerning, at least in part, their furloughs and the lack of funding of their collective bargaining agreements. It is undisputed that no petition to the Commission concerning an unlawful withholding of services was filed by the employer and no contemporaneous investigation of the situation, pursuant to Section 9A of the Law, occurred. However, facts may be adduced at a later evidentiary proceeding that substantiate a withholding of services, even in the absence of a strike investigation proceeding. See Holbrook Education Association, 14 MLC 1737, 1740 (1988). Moreover, I do not consider the employer's apparent tacit endorsement of the faculty job action to be dispositive of the chargeability issue. Instead, I am persuaded that the faculty disrupted and withheld expected services on April 17 and 18, 1990. Therefore, I delete the value of the staff time spent directly incident to the two-day job action.[41]

In contrast, staff time and expenses associated with the protests mounted by the Education Association of

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[40] Again, the State-wide Crisis Team is separate and distinguishable from the staff crisis team.

[41] Specifically, I have deleted the value per hour for 25 hours of P. Lyon's 4/17 and 4/18 activity. I also consider 3 hours, allocated to Program 3.2 by M. Gallagher, to be related to the job action. The value of that time is deleted, infra.

Worcester (EAW) are fully chargeable. The EAW successfully protested the potential layoff of 400 teachers, without the withholding of any services. I consider the local's conduct to be directly related to its role as a collective bargaining agent, and the action to be precipitated by an immediate concern with local wages, hours and working conditions.

General Costs in 1.4	$136,702
Misallocated nonchargeable costs	$ 5,163
Chargeable costs in 1.4	$131,539

Program 1.5: Labor Relations Commission.

Affiliate Services field staff represent local associations at the Labor Relations Commission through the probable cause/investigation stage. It is undisputed that collective bargaining negotiations, contract administration and grievance adjustment are fully chargeable activities.

The Commission defines and enforces the collective bargaining rights and obligations of public sector employees, employee organizations and employers. By delineating mandatory bargaining subjects, the Commission effectively defines the parameters of the public sector collective bargaining relationship. A union and employer's mutual obligations to meet at reasonable times and bargain in good faith with respect to wages, hours, standards of productivity and performance, and other terms and conditions of employment, are enforced at the Commission. Sometimes, the Commission is required to enforce the duty to bargain in good faith before a collective bargaining agreement is reached. Likewise, Commission intervention may be necessary to enforce a contractual grievance and arbitration provision. Repudiation of collective bargaining agreement terms are also actionable

at the Commission. Since the Commission is an essential aspect of the overall collective bargaining process, Commission activity must be chargeable.

I do not consider the Lehnert plurality's prohibition against charging nonmembers for the cost of extra-unit litigation to affect Program 1.5 charges. First, the provisions of G.L. c. 150E, and precedent established thereunder, are applicable to all employees represented by the MTA. Therefore, unlike the extra-unit litigation contemplated by the Lehnert court, Commission proceedings directly concern, and affect, all MTA bargaining units. Moreover, resort to the Commission's processes is not "akin to lobbying," Lehnert, 500 U.S. at 528; instead it is a component of the overall collective bargaining process and is an aspect of the Union's overall representational function. See, California Saw and Knife Works, 320 NLRB No. 11 (December 29, 1995), 151 LRRM 1121,1142 (litigation related to union's basic representational function distinguished from political extra-unit litigation contemplated by Lehnert plurality). I can advance no intelligible rationale for concluding that a just-cause arbitration in one unit is chargeable to all, but that a Section 10(a)(5) bargaining charge in the same unit is not.

One aspect of the MTA's program 1.5 activity, however, is not chargeable. The value of four hours of MTA Organizer Pippo's time, spent on an offensive organizing submission to the Commission, must be deleted.

General Costs in 1.5:	$178,832
Misallocated nonchargeable costs	$ 250
Chargeable costs in 1.5:	$178,582

(b) Direct costs of Program 1.0

The general ledger reflects that all of the Program 1.0 directs costs are charged to specific MA8, Boston office, accounts.[42] I analyze the Program 1.0 direct accounts and costs as follows:

FSO Training

One account was devoted to expenses incurred training FSO employees. One field representative attended the Harvard University Trade Union Program. Other representatives attend the NEA Health Care Strategies Conference, covering current health insurance issues, including trends in bargaining health insurance benefits and legislation and policy issues,[43] a conference that was directly related to a topical collective bargaining concern. Pippo was reimbursed $1,000 for the NEA Organizing Conference in Florida, which runs afoul of Ellis's prohibition on charging nonmembers for organizing activity. Ellis, 466 U.S. at 452-453. Its cost is deleted from the account.

Account total	$17,000
Chargeable costs	$16,000

Management Training

Regional Managers Dlouhy and Burgess attended the NEA health strategies conference, where topics included

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[42] The pertinent chart appended to Anzivino's affidavit, Tab A, reflects $2,639 in 1.0 wages not allocated to any subprogram in the Western, Pittsfield and Higher Education accounts. A total $4,322 in unallocated wage or "phantom code" charges will be proportionally charged, infra.

[43] Two UniServ attendees, G. Shea and J. Reilly, had $865 of their expenses charged to an account in Affiliate Services 4.0.

bargaining trends, membership education and cost containment. Regional Manager Coyle attended computer training.

Higher Education Manager Ross attended the NEA annual conference for members and employees providing service to NEA higher education affiliates. I consider this activity comparable to the affiliate conference for higher education units held chargeable in Lehnert, 500 U.S. 529-530.

Account total	$ 4,424
Chargeable costs	$ 4,424

MTASO Training

Computer training and human relations skill building sessions were funded for employees in the MTASO bargaining unit.

Account total	$ 6,032
Chargeable costs	$ 6,032

Temporary Clerical, Boston

The general ledger appears to reflect expenses for four temporary clerical employees, in the Boston office, during October 1990. A review of the MTA's proposed budget for 1991-1992, contained in MTA #1, reflects that funds have again been appropriated for temporary clerical help. Therefore, although the majority of temporary help expenses were incurred during the time of the Question-3 campaign, I conclude that the temporary expenses were a routine event, rather than a Q-3 campaign cost. I treat the temporary salaries as proportionally chargeable overhead, which is directly affected by the amount on nonchargeable activity undertaken by the Union and the clerical charges will be allocated in proportion to the overall chargeable activity undertaken by the Affiliate Services division. See Newton Teachers Association and

Roman (Newton I), 13 MLC 1589, 1596 (1987). Therefore, I will add the temporary clerical costs to the unallocated wages, which will all be proportionately charged at the conclusion of the Affiliate Service analysis.

Account total	$ 1,880
Chargeable costs	$ To be determined

Part-time Representatives

Competent local members may be recruited to serve as part-time representatives, to assist in negotiations, or to process grievances for small units. The part-timers are supervised by the regional managers and receive a fixed fee, from $55 to $85, for each assigned task, such as a bargaining session. To receive payment, the representative completed a voucher, stating the date, time, place and nature of the undertaken task. The part-timers are not represented by the FSO and are not considered MTA employees.

I am persuaded that, overall, the part-time representatives had little involvement in nonchargeable activity, with one exception. Jim Werme was assigned to work with the Educational Association of Worcester, at a weekly rate of $150, and, in the course of his assignments, he was paid $1,500 for activities related to the campaign against Q-3. The submitted vouchers further reveal that some representatives attended a Q-3 training session, at a cost of $730. Finally, a few representatives were compensated for limited organizing activity. I determine that $3,380 should be deleted from this account, to reflect the part time employees' nonchargeable activities.

Two expenditures for resource materials for part-time representatives were made from this account. Multiple copies of "A Guide to the Massachusetts Public Employees

Collective Bargaining Law" were purchased, as well as copies of a book titled "Selected General Laws for School Committee and School Personnel."

Account total	$97,103
Chargeable costs	$93,723

Override Cadre

An override is a municipal budget question seeking to raise local revenue above the limits imposed under Proposition 2½, by increasing the community's tax rate. Affiliate Services sponsored individuals to serve, at the direction of the Boston office, in local override campaigns. If passed, an override would increase the amount of revenue available to perform municipal governmental functions, including the funding of collective bargaining agreements.

An override question can, but need not, specifically designate money for the schools. Even where it does, the School Committee can decide to spend the additional revenue on priorities other than salaries, or other employee benefits. Here, the record demonstrated the relationship between available revenue levels and educators' terms and conditions of employment. Lack of finances precipitate layoffs. At the collective bargaining table, a union may face a Hobson's choice between maintaining or increasing salaries funded by potential layoffs or accepting no increase to preserve job security.

Nonetheless, I do not consider the override expenses to fall within Lehnert's narrow exception to the nonchargeability of political activity. The court permitted a union to charge for lobbying activity "in the limited context of contract ratification or implementation." Lehnert, 500 U.S. at 522. I do not consider the record sufficient to demonstrate that revenues generated by local

override efforts would necessarily be committed to funding extant collective bargaining agreements. Instead, I consider the override activity to be analogous to the lobbying to affect ballot questions and local taxes for the support of public schools deemed nonchargeable in Lehnert.

Account total	$7,461
Chargeable costs	$ 0

Crisis Fund

The MTA will reimburse a local for up to $2,000 of bargaining crisis related activities, like those discussed in Program 1.4, above. Payments were made to Watertown, Salisbury, Blackstone-Millville, Somerville, Winchester, New Bedford and Stoughton. Generally, in the absence of a withholding of services or impermissible lobbying for general tax revenue increases, crisis expenditures are fully chargeable. Therefore, I consider the reimbursements to Blackstone-Millville, Somerville, New Bedford and Stoughton to be fully chargeable, in the amount of $6,015.

The Watertown Teachers Association requested reimbursement for its 1989 bargaining crisis, listing expenditures in the amount of approximately $6,800. Having reviewed the submitted expenditures, I conclude that the $2,000 received from the MTA is fully chargeable under Lehnert, as it relates to crisis activities prior to the strike.

Likewise, I conclude that the $2,000 reimbursement to the Winchester local is fully chargeable. The submitted Winchester expenses demonstrate that at least $2,700 was expended concerning the on-going bargaining crisis; costs that were not incidental to the one day withholding of services. Moreover, I consider the flyers and postage

expenses urging Town Meeting funding of the successor contract to be chargeable lobbying under Lehnert.

Other costs that are chargeable in this account include the $2,500 fee to a consultant concerned with the November-December UMass fiscal crisis, which was resolved without resort to layoffs. Finally, I include the charges for food at various March, April and June meetings.

The direct costs associated with the Salisbury override and lobbying campaign are nonchargeable. Similarly, I delete the charges for transportation to attend the Penny on the Sales Tax press conference and a small amount of unidentified costs.

Account total:	$15,498[44]
Chargeable costs:	$14,382

Local Representative Training

Reimbursement for training local building representatives, who monitor compliance with the prevailing collective bargaining agreement at the building level and act as an advocate for unit members, when necessary, is available from this account.

Account total:	$ 2,861
Chargeable costs:	$ 2,861

Collective Bargaining Councils

Collective bargaining councils were formed in 1990-1991 as a forum for locals to discuss bargaining issues, including the consequences of accepting a zero salary increase. However, local leaders did not appear to share the staff's enthusiasm for the exchanges and,

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[44] Actual disbursements from the account exceed the $10,623 total included in Anzivino's affidavit because the account contained a $4,487 credit at the beginning of the year.

according to Regional Manager Coyle, the councils met only a few times.

Account total:	$485
Chargeable costs:	$485

Negotiations Support

Reimbursement for higher education affiliates' bargaining expenses was available from this account. The account total reflects the mileage costs attendant with bargaining teams comprised of representatives who live throughout the state.

Account total:	$33,900
Chargeable costs:	$33,900

Staff Meeting/Training

Traditionally, Bonazzi held nine monthly meetings of the entire Affiliate Services staff from September through May. The meeting format was a morning session, lunch and an afternoon session. In 1990-1991, there were nine all-day meetings, on September 7, October 28, December 8, January 31, February 6, February 27, April 5, May 2 and June 20. Meetings were held outside of the MTA offices, due to the size of the staff, and the account includes charges for food, room rentals and training.

Although a staff meeting agenda may be prepared and circulated, I credit the testimony that the meetings were not confined to either a single item or a set agenda. Instead, the meetings routinely served as a forum for discussion of staff and local association concerns, including the status of, and trends in, collective bargaining. Although the MTA's political campaigns were discussed in the context of staff meetings, I do not find that the purpose of the staff meetings was either to execute or coordinate the operation of political activities. By and large, separate meeting sessions were held to plan and

execute the political campaigns and the costs of such meetings have been substantially segregated. I do not consider the agenda and correspondence items offered by the Charging Parties sufficient to rebut the consistent testimony concerning the chargeable character of the routine staff meetings. Instead, I conclude that Affiliate Service staff meeting costs are reasonably incurred in the Union's role as an exclusive bargaining representative.

Similarly, the regional managers had regular meetings. While Bonazzi would provide updates on pending political campaigns, I find that the focus of the managers' meetings was the day-to-day operation of the divisional offices, and the attendant collective bargaining concerns. Again, the purpose of the meetings was not to plan MTA political activity.

The charges for the annual staff retreat, held June 3-5 on Cape Cod, are found in this account. Chargeable presentations on health insurance and municipal bankruptcy occurred. As more fully described in Professional Development, infra., Division Manager Andelman spoke about the Massachusetts Business Alliance for Education proposal, a chargeable internal training function. Finally, representatives of NEA affiliates in other states spoke on their experience in statewide strikes and their transportation costs were charged to this account. Because I consider the conduct of a statewide strike to be akin to nonchargeable lobbying, I delete the transportation costs for the session presenters, at a total of $2,657. However the presentation may arguably be considered an internal information gathering exercise, and a broad-based discussion of concerted activity options, which had little additional impact on nonmembers' First Amendment

rights. Therefore, I will not alter any allocations of staff time spent at the retreat.

Account total:	$18,805
Chargeable costs:	$16,148

Program 1.3: Member Compensation Project.

The goal of the member compensation project was to formulate mechanisms for improving the compensation and benefits of school employees. Few funds were expended for the project in 1990-1991, given the prevailing financial climate and the relatively dim prospects for salary progress. Therefore, the Board of Directors authorized spending the majority of the account on the Penny on the Sales Tax campaign and on expenses associated with the state budget issue. Bills from outside vendors for Penny campaign expenses were paid from this account. The account was also used for campaign postage.

Several chargeable items, however, are contained in this account. The development of the Contract Analysis and Retrieval System program (CARS) involve chargeable costs. The March 1991 Collective Bargaining Conference involves the chargeable costs of hotel rooms, food and fees. Expenses for guest speakers, on the topics of health insurance and the economic issues impacting collective bargaining, are also chargeable. The cost of a member compensation project meeting and the fees of two consulting firms producing related studies are likewise chargeable. Finally, I include the fees to health insurance consultants within the chargeable costs.

Account total:	$ 151,461
Chargeable costs:	$ 37,934

Total direct costs in 1.0 and member compensation 1.3:	$ 355,030[45]
Chargeable direct costs in 1.0:	$ 225,889
TOTAL COSTS IN PROGRAM 1.0:	$2,473,660
TOTAL CHARGEABLE COSTS IN PROGRAM 1.0:	$2,324,828

Program 2.0: Contract Maintenance.

(a) General costs in Program 2.0

Program 2.1: Grievances.

Included in this subprogram are investigating, evaluating, filing, processing, and settling grievances. The value of Pippo's two hours of offensive organizing activity has been deleted.

General costs in 2.1:	$1,012,927
Misallocated nonchargeable costs	$ 116
Chargeable costs in 2.1:	$1,012,811

Program 2.2: Arbitrations.

Field staff handle all arbitrations except those involving dismissals, suspensions, lay-off or recall rights. The field representatives file the demand for arbitration, prepare the evidence, present the case, write the brief, interpret and, when necessary, explain the award.

General costs in 2.2:	$ 216,135
Chargeable costs in 2.2:	$ 216,135

Program 2.3: Grievance Training.

The Affiliate Service Division offers training opportunities to building representatives and grievance chairpersons at Williamstown workshops and through formal and informal programs at the locals.

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[45] This excludes $2,639 in unallocated wages and $1,880 in temporary clerical help, which will be proportionally charged.

General costs in 2.3	$ 25,821
Misallocated nonchargeable costs[46]	$ 239
Chargeable costs in 2.3	$ 25,582

(b) Direct costs of Program 2.0

There were no direct costs in Program 2.0

TOTAL COSTS IN PROGRAM 2.0	$1,254,883[47]
CHARGEABLE COSTS IN PROGRAM 2.0	$1,254,528

Program 3.0: Local Association Strength.

A union may not charge nonmembers for activities to recruit members among workers outside of a bargaining unit, or to recruit new members within a unit. Ellis, 466 U.S. at 452 and 452, n.13. Since a union cannot charge for the costs of recruiting new members within a bargaining unit, it would be inconsistent to permit a union to collect the costs to defend a unit from a rival's raid, or against disaffected employees decertification efforts. Moreover, such activities may add to the burden on a nonmember's First Amendment rights since the nonmember may prefer some other union or no union. Therefore, activities taken to defend bargaining units threatened with incursion by rival organizations, or, conversely, taken to directly perpetuate a union as the sole representative of a bargaining unit, are nonchargeable. Reese I, 798 F.Supp. 463, 470 (1992). aff'd Reese II, 826 F.Supp. 1115, 1120 (1993); Albro, 585 N.E.2d. at 673; Browne, 485 N.W.2d

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[46] As noted in Strecker's affidavit.

[47] Wages allocated to non-existent 2.0 program codes, in the amount of $1,060, have been excluded from this total and will be proportionally charged.

at 388. cf. Bromley, 843 F.Supp. at 1155 (activities to protect and strengthen existing bargaining units, including defending against decertification petitions, are chargeable). In the parlance of the MTA, activities relating to offensive, internal and defensive organizing are all nonchargeable.

Activities undertaken to strengthen and revitalize troubled locals, however, are chargeable. I consider revitalization activity, as described in program 3.2, below, to be chargeable because: it is distinguishable from organizing and is not devoted to increasing membership; I credit the testimony that it directly influences collective bargaining effectiveness; and, as internal union communication, it does not significantly further burden nonmembers' free speech interests.

(a) General Costs in Program 3.0

Program 3.1: Membership Assessment.

In general, the MTA's internal membership recruitment activities are allocated to this program code. Each fall, the field staff are involved in local membership appraisals and evaluations, to analyze and determine activities or services to maintain and/or recruit members. This component of the MTA's internal organizing and membership campaign is nonchargeable.

In the Boston office, the following activities are charged to program 3.1: developing the annual membership campaign, processing membership information, addressing dues and benefits questions, working on projects to increase membership among retirees, students and nurses, implementing governance actions and working with the Small/Mid-Size Locals Committee on its Williamstown program and with a program to assist active employees prepare for retirement.

Arguably, 3.1 charges by Boston office personnel include both chargeable and nonchargeable activities. For example, a distinction may theoretically be drawn between actions taken to recruit members, and the processing of dues and data from individuals who have elected to join the union, the latter being operations essential to the Union's corporate or associational existence that involve no additional burden on nonmember's free speech interests. See Ellis 466 U.S. at 448. However, I am unable to identify or segregate the various 3.1 Boston activities.[48] Therefore, with one exception, the program is nonchargeable.

Pippo's attendance at the Williamstown conference, totaling 34.5 hours (a figure that excludes his Q-3 involvement and his abbreviated track presentation), is chargeable. Because Pippo considered and designated his New Jersey trip "Membership-Org-Recruitment", I decline to accept the Union's suggestion that it is chargeable as an internal governance matter.

General Costs in 3.1:	$413,262
Chargeable costs in 3.1:	$ 1,837

Program 3.2 Revitalization of locals.

Activities undertaken to strengthen or revitalize local associations that have become weak or ineffective are allocated to program 3.2. Revitalization efforts are distinct from membership recruitment attempts and may even occur in locals with 100% membership. The effectiveness of a local association may deteriorate for a variety of reasons, including poor leadership or extraordinary

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[48] Strecker routinely recorded all 3.1 charges in the same manner, "Local Assn Strength-Memb."

pressures. Revitalization strategies may include regular visits by MTA personnel, meetings with the leadership, recruiting new leaders and encouraging the local to avail itself of MTA's collective bargaining and other support services.

Certain nonchargeable activities misallocated to this overall chargeable subprogram have been identified and segregated. I have deleted the value of the following nonchargeable activities: Bonazzi and Pippo's 8.5 hours of offensive organizing; the misallocations of political campaign activity charted by Strecker; and, Gallagher's April 17 activity at UMass.

General costs in 3.2:	$104,649
Misallocated nonchargeable costs in 3.2	$ 1,606
Chargeable costs in 3.2	$103,043

Program 3.3: Organizing.

As Organizer, Arthur Pippo was almost wholly responsible for the MTA's offensive organizing efforts. The field staff's combined 70 hours, or so, of organizing activities were primarily defensive in nature. However, as stated above, I consider both offensive and defensive organizing activities to be nonchargeable.

The only activity that may be charged to nonmembers in this area is Pippo's computer training, totaling 23.5 hours between 3/1/91 and 4/1/95. The record reflects an increased emphasis in field staff computer literacy, as well as an attempt to create a collective bargaining data base and contract retrieval system.[49]

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[49] In addition to his organizing duties, Pippo also performed some routine functions of a field representative, including crisis activities and a grievance arbitration.

General costs in 3.3	$58,503
Chargeable costs in 3.3	$ 1,251

(b) Direct costs of Program 3.0

All of the direct costs in program 3.0 are found in the MA8, Boston office, account. The record establishes the following chargeable direct costs:

Organizing Campaign account

Expenditures for chargeable items are contained within the organizing account.[50] Revitalizing campaigns were conducted for the locals in Watertown and the University Staff Association (USA). In each instance, I am persuaded that the revitalizing effort was unrelated to either offensive or defensive organizing activity. Testimony revealed Watertown's recent bargaining difficulties and leadership changes. Additionally, the record reflects the troubled nature of the USA local association, prompting an NEA team assessment and evaluation of the strengths and weakness of the USA local. The following chargeable costs are related to the revitalization efforts: $5,114 in audit charges; $16,310 in the salary and benefits for full-time release for the USA president, to improve collective bargaining services; $709 in meals, including a dinner with Bonazzi and meals during the NEA assessment; and, $1,103 in printing costs.

A number of locals received assistance for unusual collective bargaining expenditures. The following costs are chargeable: $8,950 in fees for consultants to assist with health insurance negotiations in Newton, Winches-

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[50] Contrary to the Charging Parties' position, I do not consider an account's title to necessarily dictate the chargeability of all expenditures contained therein. (Charging Parties' Brief, Vol.II, p. 127).

ter, Randolph and Braintree; the $1,500 balance from the consultant's fee hired to assess the UMass fiscal crisis; $506 to print the Cambridge Teachers Association collective bargaining agreement.

Hotel expenditures for the October 1990 higher education conference were paid from this account. The conference topics included information about school funding, enrollment, the structure of the higher education system, an overview of the MTA organization and a presentation on organizational behavior; all of which are to collective bargaining. The $10,018 hotel bill is chargeable. The account also contains $3,832 of miscellaneous expenses for supplies, delivery charges, postage and telephone. It is reasonable to infer that the miscellaneous expenses here are related to the other activities charged to the instant account. Therefore, I have prorated the charges based on the chargeable/nonchargeable account cost ratio. Accordingly, $3,296 of the miscellaneous costs, 86% of the total, will be included in the chargeable account total.

I consider the balance of the account to be nonchargeable. Specific expenditures that I have excluded are: recruiting expenses for retiree members, Pittsfield presence costs, "Insight" issues, and bargaining unit lists charges.

Total account costs:	$55,407
Total chargeable costs:	$47,505

Membership Campaign account

This account contains the following costs: of Q-3 victory parties; a flyer for the members-only attorney referral program; a contribution for the cost of a UMass funding flyer; and, membership retention and recruitment projects. The entire account is nonchargeable.

Total account costs: $ 7,092
Total chargeable costs: $ 0

Local Leadership Development account

Any local association was eligible to receive local leadership training funds from this account. The only 1990-1991 expenditure involved training following the NEA assessment of the USA local. The April 9 and 10, 1991 training was provided by Gallagher, Manager Ross and NEA staff.

Total account costs: $ 3,965
Total chargeable costs: $ 3,965

Large Urban Local account

Expenses for the large urban local meeting on April 4 and 5, 1991 are found here. The meeting's agenda reveals that at least two-thirds of the event was devoted to social or collegial interactions among the representatives of the Commonwealth's 15 largest K-12 institutions. The meeting's activities included reviewing contract clauses, recounting day-to-day issues, planning future meeting events, and refreshment opportunities. The remainder of the meeting concerned Operation Reveille and, possibly, a legislative update. I consider any political discussion to be largely incidental to the meeting's overall information sharing and social objective, which are germane to collective bargaining.

Total account costs: $ 3,077
Total chargeable costs: $ 3,077
Direct costs in 3.0: $ 69,541[51]
Chargeable direct costs in 3.0: $ 51,251

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[51] This excludes the $2,609 in costs associated with Pippo's nonchargeable attendance at an organizing conference that was originally allocated to program 3.0.

TOTAL COSTS IN PROGRAM 3.0:	$645,955
CHARGEABLE COSTS IN PROGRAM 3.0:	$160,678

Program 4.0: Membership Involvement.

(a) General Costs in Program 4.0

Program 4.1: Special Constituencies.

In the regions, time spent providing collective bargaining services to educational support personnel units administrators and higher education personnel are allocated here. The majority of time spent in this program area involves higher education bargaining unit members.

However, nonchargeable activity was misallocated to this chargeable area. I have deleted the value of the following activities: Pippo's 7.5 hours of Q-3 and Reveille activity; J. Carpenter's constitutional amendment hours; and the misallocations of political activity charted by Strecker.

General costs in 4.1	$174,375
Chargeable costs in 4.1	$172,240

Program 4.2: Political Activity.

The Charging Parties and the MTA express vastly different visions of the Affiliate Services staff's involvement in the Union's nonchargeable political campaigns. The Charging Parties characterize the Affiliate Services Division as "the heart of the MTA's political machine," while the MTA argues that, except for conceded meetings and activities, the field staff played a limited political role.

The record reflects that, by and large, the MTA's political campaigns originated in Boston and, when requested, were undertaken, with varying degrees of dedication and enthusiasm, by the regional managers and staff. I credit the consistent import of the sequestered regional managers' testimony that political activity was

not considered to be a primary function of the field staff. Because various campaigns' goals did not necessarily reflect bargaining unit members' interests or concerns, they were not readily endorsed or supported by the front-line, somewhat beleaguered, field staff.

Undoubtedly, the perceived economic consequences of the Q-3 referendum, combined with the already ominous municipal financial climate, was a motivating campaign force. The anti-CLT Planning Committee introduced the Q-3 campaign to Affiliate Services and other MTA staff on July 31, 1990 at a meeting in Marlborough. On August 9, another meeting took place to prepare for Williamstown, and a third Q-3 meeting was held in Marlborough on August 30, with part-time employees in attendance.

At Williamstown, some field staff, as well as other MTA staff, introduced the campaign to local leaders on August 14, "Beat CLT Day." The presenters attended a preparation meeting the previous evening. Guest speakers, including James Braude of the Tax Equity Alliance, addressed a morning plenary session on "Beat CLT Day." In the afternoon, small groups met, with MTA staff, including field representatives, facilitating the discussions. MTA staff distributed the Q-3 material prepared by the Communications Division to the local presidents, including survey cards, a manual and the so-called "Ammo" book.

In late August, Bonazzi issued memos to field staff, regional managers and local presidents emphasizing the importance of the campaign. At a series of meetings on August 28-30, the regional managers and some field staff (including part-timers on August 30) introduced the Q-3 campaign to local presidents who had not attended

Williamstown. Campaign material and survey cards were distributed, along with envelopes in which the local presidents were supposed to mail the cards, in bulk, directly to Boston. In some cases, staff delivered cards to locals that had not attended either Williamstown or the regional meetings.

From that point on, the field staff's role in the Q-3 campaign was more limited. It was the local building representatives' responsibility to gather the completed cards and turn them over to the local president. In mid-September, Bonazzi sent memos to both the field staff and the local presidents, urging them to see that the completed survey cards were returned. Accordingly calls were made to local presidents. In some instances, further local training sessions were also held.

To clarify any confusion about how to record Q-3 time, Strecker issued a September 10, 1990 memo, stating that anti-CLT hours should be charged to 4.2. Indeed, an extensive review of field staff time sheets reveals Q-3 charges, appropriately coded to 4.2, for local Q-3 contacts. Additionally, Pippo allocated his September 3 through November 6 stint as regional coordinator for TEAM's Q-3 campaign to program 4.2.

Bonazzi and Regional Manager Lahey were members of the Anti-CLT Planning Team that met eight times between July and November 6, 1990. The Staff Crisis Team, which consisted of ten field representatives, had three meetings on Q-3. At the end of September, as part of the planned Phase II of the campaign, regional meetings were held to train Reveille coordinators, attended by most field representatives. Staff members were asked to work the polls on November 6, Election Day, and many

did. Some staff attended the regional Q-3 debriefing meetings in November and December.

Outside of these activities, the Affiliate Services field staff played a limited role in the Q-3 campaign. I am persuaded that the Boston headquarter's Q-3 paper production and meeting rate far outstripped the field staff's involvement. I am persuaded that the bulk of MTA's Q-3 campaign largely involved a series of acts and memos of Bonazzi, his meetings with a few others, and 11 larger scale meetings. The MTA has conceded each of the 11 wholly political events attended by more than 5 affiliate services staff during the Q-3 campaign, and the other meetings referred to above, either by initially charging them to 4.2 or by identifying the errors in Strecker's affidavit. The appropriate value of the misallocations have been deleted from the applicable program areas.

After the Q-3 campaign, MTA Vice President Murphy moved to make his Operation Reveille concept a permanent grass roots political action force. Despite the Boston office's detailed plans and efforts, I credit the regional managers' consistent testimony that local interest in the concept largely evaporated. The remaining Operation Reveille activities have been appropriately identified in Strecker's affidavit, and the value of any misallocations have been deleted from the applicable program areas.

The Penny on the Sales Tax campaiqn commenced in regional meetings, at which the field staff again distributed campaign materials, including postcards. The staff's remaining task was to see that the cards were mailed. As the campaign wound down, they were asked to collect cards and see that they were mailed. When possible, cards were collected during ordinary visits to assigned

locals. Penny Campaign activity has been appropriately identified in Strecker's affidavit, and the value of any misallocations have been deleted from the applicable program areas.

Finally, Bonazzi, Pippo and Carpenter spent a small amount of time on the constitutional amendment. A misallocation concerning Carpenter's time has been addressed in program 4.1, supra.

The value of all political activity misallocations, identified by original program code, are:

1.1	$10,214	2.3	$ 239
1.3	$ 3,883	3.2	$ 1,154
1.4	$ 5,163	4.1	$ 1,524
1.5	$ 341	5.0	$11,955
General costs in 4.2			$491,341
Chargeable costs in 4.2			$ 0

Program 4.3: Membership Assistance.

The Membership Assistance Program was offered to bargaining unit employees with drug, alcohol or personal problems. Employees typically came to the program because they faced possible disciplinary action. In addition, Bonazzi erroneously allocated 20.5 chargeable hours spent on higher education special constituency concerns and Board of Directors meetings to this program code.

Union programs or services that bring about harmonious working relationships and promote closer ties among employees may be sufficiently related to collective bargaining to be considered chargeable expenditures. See, e.g., Brown and Chicopee Fire Fighters, 14 MLC 2341, 1253 (1987)(fund used for travel to firefighters' funerals is chargeable); Roman and Newton Teachers Association (Newton II), 15 MLC 1094, 1097 n.26 (H.O. 1988)(credit

union providing benefit that might otherwise have to be negotiated with the employer is chargeable). Accordingly, the Membership Assistance Program is chargeable.

General costs in 4.3	$7,321
Chargeable costs in 4.3	$7,321

Program 4.4: Recruitment of Members for Leadership Positions.

The Boston office performed no activity in this subprogram. Higher education staff spent 20 hours recruiting members for association governance positions and/or for MTA employment opportunities. Internal union leadership and employment recruitment is vital to a union's corporate and associational existence and imposes no additional free speech burdens. Therefore, it is chargeable.

General costs in 4.4	$1,104
Chargeable costs in 4.4	$1,104

(b) Direct costs of Program 4.0

All of the program 4.0 direct costs were incurred in the MA8, Boston office, account.

FSO Training account

The balance of the chargeable training costs detailed in program 1.0 above, are allocated here.

Total account costs	$865
Total chargeable costs	$865

ESP Conference

Regional workshops were held to train ESP local associations in basic collective bargaining and contract maintenance skills, the MTA organization and its services.

Total account costs	$3,327
Total chargeable costs	$3,327

Higher Education Program

The Higher Education Leadership Council consisted of chapter or campus presidents, local presidents and higher education members of the MTA Board and Executive Committee. It met once a month and council members were reimbursed for their food and mileage connected with the meetings.

Total account costs	$3,254
Total chargeable costs	$3,254

Higher Education Conference

The chargeable NEA Higher Education Conference was held in Boston on March 1-3, 1991, consisting of an all-day leadership workshop followed by various seminars. Another conference was held on February 15, 1991, attended by a legislative panel. Other February conference items included discussion of the Weld budget, concerted activities and pending legal actions. I have deleted the entire cost of conducting this conference, although certain agenda items are arguably chargeable. However, due to the mixed content of the meeting and the value of formal and informal staff/membership interaction at such events, I have not deleted any corresponding staff time for attendance at the conference, thereby roughly approximating an overall ½ chargeable figure for the conference.

Total account costs	$4,728
Chargeable account costs	$2,000

Retiree Conference

The March 1991 conference focused on issues facing teachers planning to retire. Like the Members Assistance Program, this program is chargeable.

Total account cost	$1,661
Chargeable account costs	$1,661

Membership Assistance Program

The only account expenditure was for membership in the Employee Assistance Association for the field representative in charge of the program.

Total account cost	$ 200	
Chargeable account costs	$ 200	
Total direct costs in 4.0		$ 14,035[52]
Chargeable direct costs in 4.0		$ 11,307
TOTAL COSTS IN 4.0		$688,923
TOTAL CHARGEABLE COSTS IN 4.0		$190,869

Program 5.0: Administrative Management.

In the regions, only the regional managers allocated time to 5.0, for paperwork, scheduling, performance evaluations, management meetings, and similar administrative tasks. Some regional managers allocated attending internal Union functions, like governance meetings or TASCs, to 5.0. As will be more fully discussed in Professional Development, infra., I consider TASCs to be a forum germane to collective bargaining. I find the political content of several meetings to be largely incidental to their overall purpose, and incidental to the regional managers' attendance. Instead, I find that the regional managers attended to keep their pulse on local collective bargaining concerns, to be available for questions and comments, and to interact formally and informally with local leaders. Therefore, I permit all TASC charges.

Boston office personnel allocated a lot of time to 5.0, including most of Bonazzi's time. Strecker allocated time spent in connection with field and managers' meetings to 5.0, as well as the time she spent reviewing time and

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[52] This excludes the $622 in unallocated wage expenses reflected in Anzivino's affidavit, Tab A.

expense reports, developing and monitoring the budget, processing vouchers and assisting in the day-to-day operation of the division.

Program 5.0 direct costs include overhead for the regional offices, like rent, telephone charges, equipment, supplies, cleaning, printing and mailing, professional dues and subscriptions.

An administrative program like 5.0 appears in each MTA division. Time spent within these programs fall within the "presumptively proportionally chargeable" overhead expenses delineated in Newton Teachers Association and Roman (Newton I), 13 MLC 1589, 1596 (1987). Expenses like those in program 5.0 are "directly affected by the amount of [nonchargeable] activity undertaken by a union." Therefore, administrative expenses are allocated according to the proportion of chargeable and nonchargeable activity undertaken by a division, unless either party overcomes the presumption by proving a different allocation in fact. Id.

Here, the record reveals that, in some instances, Bonazzi, the Q-3 campaign leader, charged Q-3 time to program 5.0 instead of 4.2. Similarly, Strecker charged some Q-3 activity time to 5.0, while, in some instances, regional managers allocated political meetings to 5.0. Therefore, I will first segregate and delete the value of Bonazzi's, Strecker's and the regional managers' time from 5.0 total costs. Then, the remaining program costs will be proportionally charged.

Total costs in 5.0 $ 760,239[53]

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[53] I have not deleted unallocated wages of $254 because this cost will be proportionally charged.

Less value of misallocated costs	$ 12,247[54]
Costs in 5.0	$ 747,992
TOTAL COSTS OF PROGRAMS 1-4	$5,062,674
CHARGEABLE COSTS OF PROGRAMS 1-4	$3,932,006
CHARGEABLE PROPORTION:	77.6%
CHARGEABLE PROPORTION OF 5.0:	$ 580,442
SUBTOTAL CHARGEABLE COSTS OF AFFILIATE SERVICES	$4,512,448
+ 77.6% UNALLOCATED WAGES AND TEMPORARY CLERICAL COSTS ($4,812)	$4,517,260

CHARGEABLE COSTS OF DIVISION OF AFFILIATE SERVICES

Total costs:	**$5,829,385**
Chargeable costs:	**$4,517,260**

VI. DIVISION OF LEGAL SERVICES

Overview

The Division of Legal Services- has three program areas. Program 1 includes legal services provided to members and affiliates, consultations and representation in connection with retirements, and, the Attorney Referral program. Program 2 covers internal services provided to other MTA divisions, while Program 3 involves the division's management. The present demand does not

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[54] Total from all misallocations identified in Strecker's affidavit, which comports with my extensive review of time sheets.

include charges for Program 1, which comprises the bulk of the division's costs.

General Counsel Ann Clarke is the head of the Division of Legal Services. Over the course of 1990-91, the division had eight staff attorney positions that were filled by nine attorneys. The division also employed a Legal Administrative Supervisor, three secretaries, a Division Coordinator, and 15 law students, who worked with the attorneys and kept time sheets. Nine part-time retirement consultants were also employed by Legal Services. Finally, Clarke sometimes used outside counsel.

The division received a total of 733 requests for legal services in 1990-91. In most cases, the requests were assigned an attorney and a case number. The assigned case number identifies the local or MTA division involved, the year and sequence of the assignment and, finally, the case's program code. Local associations enlist Legal Services' assistance by submitting a "green sheet," or legal services request form. Program 2 services, to MTA officers, divisions and staff, are usually initiated by a phone call to Clarke. If there is not an existing generic case number to cover the request, a new case file is created.

As noted in the MTA Overview, the attorneys' time sheets and their time accounting differ from those of other MTA professional staff. Because the NEA reimburses the division for activity in certain subprograms, attorneys link their time to case numbers, which in turn are tied to subprograms. Thus, attorney time is allocated directly to the division's subprograms.

Attorneys are reimbursed for the same expenses as other staff. Unlike other staff, they allocate their daily expenses directly to the case. and its corresponding

subprogram, on which they spent the most time that day. Personnel costs for the staff attorneys are primarily found in program 1; they are not in program 3 at all. Clerical salaries are spread proportionally across programs 1 and 2.

Expenditures of the Division of Legal Services:

Program 1.0: Legal Services to Members and Affiliates.

The MTA initially made no demand for program 1.0 activities. During the course of the instant proceeding, the Union indicated that it was seeking program 1.0 charges. By its May 11, 1993 Ruling, the Commission limited the MTA to seeking charges for Legal Services programs 2 and 3.

Total costs in program 1.0:	$1,411,676
Chargeable costs in program 1.0:	$ 0

Program 2.0: Legal Services to Other MTA Program Areas.[55]

Clarke performs the majority of work charged to program 2.0. Since assuming the General Counsel's position in 1985, she has seldom asked staff attorneys to draft legislation. Instead, she undertakes that task personally, or it is performed in Governmental Services.

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[55] The Charging Parties renew their request for the imposition of sanctions concerning discovery issues in this program area, arguing that the MTA should be precluded from collecting any fee from the Legal Services Division due to their alleged intransigence in providing access to Legal Services' materials. (Charging Parties' Brief, Vol. III, p. 13). I decline to impose the requested sanction.

Program 2.1: Recurring corporate matters.

(a) General costs

Chargeable activities performed by MTA attorneys within this subprogram occur within the following areas:

MTA management meetings

As a member of the MTA' s internal management team, Clarke attended 15 MTA management meetings during 1990-1991. Attendance at a few of the management meetings may have been charged to divisional administration, program 3.0. I consider Clarke's attendance at the meetings to be a necessary corollary to her function as counsel to the MTA corporation. Therefore, I will not alter her hours due to any incidental political discussion that may have occurred during the management meetings. However, I will delete the value of Clarke's Penny on the Sales Tax meeting attendance, at $752.

Local association presidents

Clarke issued periodic updates and memoranda about pertinent legal developments to all local presidents, MTA staff and the MTA Board. Update topics included: arbitrations, health insurance, sex discrimination, tenure, the duty of fair representation, the state budget, taxes, Proposition 2½, referenda and initiative petitions, elections, campaign finance, agency fee, bill of rights issues, workers compensation, civil service, drug testing, and child abuse. Subjects like arbitration and health insurance are inherently related of collective bargaining and, therefore, are facially chargeable. See Woburn Teachers Association and Dailey, 13 MLC at 1564. Other topics concerned cases and statutes affecting conditions of employment and general municipal government issues that are germane to the myriad of collective bargaining

functions performed by the Union leadership. Moreover, the digests would enhance a working knowledge of the interplay between statutes affecting working conditions and c. 150E. Finally, I do not consider Clarke's descriptions of legislative enactments and cases relating to political activities to implicate the First Amendment rights of nonmembers. Instead, her memoranda are neutral accounts of legal changes that may affect or influence the collective bargaining process.

Agency fee

Attorney Brian Riley allocated time spent providing legal advice and representing the MTA in connection with agency service fee matters to program 2.1. Litigation and agency service fee advice are both incidental to negotiating and administering a collective bargaining agreement. Therefore, such time is chargeable. See Lehnert, 500 U.S. at 528; Ellis, 466 U.S. at 453; See also, Brown, 14 MLC 1254 (union's expenses of defending against a nonmember's agency service fee challenges were chargeable).

Work with Edward Sullivan

Clarke maintained a case file for miscellaneous meetings with Executive Director-Treasurer Edward Sullivan that did not fit into existing case numbers or categories. Often, the meeting conversations would involve personnel matters, because it was Clarke's general practice to record more subject specific meetings with Sullivan to different case numbers. For reasons further detailed in the Administration and Personnel discussion, infra., I consider personnel matters to be fully chargeable. However, I delete the value of a meeting dealing with Q-3 campaign finance filings, at a cost of $41.

Committee on Specific Objectives

Clarke was the staff consultant to the MTA's Committee on Specific Objectives, a subcommittee of the Board tasked with streamlining the specific objectives of the MTA. The Committee's charge was to consolidate MTA's objectives, as adopted by the Board in 1989. Instead, the objectives were largely discarded. Clarke's committee time is fully chargeable because the committee performs a pure governance function.[56]

Retirement Committee

Clarke represented MTA management on the MTA Retirement Plan Committee and provided advice to Sullivan on employee retirement issues. This is a fully chargeable personnel matter.

Winchester strike

Staff attorney Cenci's one program 2.1 assignment was representing the MTA in connection with a strike petition filed by the Winchester School Committee against, inter alia, the Winchester Education Association and the MTA. The School Committee withdrew the petition against the MTA and Cenci spent only five hours on the matter.

The Commission did not make a finding concerning any MTA participation in the unlawful strike. As discussed in Affiliate Services 1.4, supra., I find that the MTA did not assist in the local decision to stage the one day sick out. Nonetheless, the fact that the MTA may be named as a defendant in any filed strike investigation petition, thereby requiring MTA counsel, is a foreseeable,

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[56] A more detailed analysis of the chargeability of governance functions is found in the Division of Governance discussion, infra.

and even routine, consequence of a withholding of services committed by a MTA affiliate. Therefore, I delete the $418 value of Cenci's representation because it is an expense directly incident to an affiliate's unlawful work stoppage.

Legal interns

Staff attorneys Fader and Gibson's 2.1 activity involved recruiting and hiring legal interns. This personnel function is fully chargeable.

Professional ethics

Fader was staff consultant to the MTA Professional Ethics Committee, which enforces the standards of the Code of Ethics of the Education Profession. Adherence to the code is a condition of MTA membership. In general, the code prohibits certain behaviors which are inimical to the profession and which would likely lead to discipline or dismissal. The Committee is a governance function and is fully chargeable.

Misallocated Administrative Activity

I credit Clarke's averment that 13 hours, at a cost of $1,087, was spent compiling division reports; an activity that was erroneously allocated to program 2.1. The cost of this activity is moved to division management, program 3.0.

Nonchargeable 2.1 activity

The MTA filed an amicus brief in favor of a state sales tax on services, in Opinions of the Justices, 408 Mass. 1202 (1990). Staff attorneys Fader, Quinn, Weissinger and Williams, along with legal interns, spent a total of 121.4 nonchargeable hours on the service tax case, at a cost of $10,153.

Clarke allocated three areas of nonchargeable activity to program 2.1. Clarke contributed to the MTA's service

fee brief. In addition, Clarke was the only MTA attorney involved in litigation challenging the system of public school finance in the Commonwealth. The litigation, McDuffy v. Secretary of Executive Office of Education, 415 Mass. 545 (1993), was sponsored by a group known as the Council for Fair School Finance. Finally, Clarke provided advice regarding the Teachers Trust Fund. The parties stipulated that activity in connection with the Fund was nonchargeable. Clarke allocated a total of 109.7 hours to McDuffy, the service fee case and the Teachers Trust Fund, at a cost of $9,175.

General costs in 2.1: $37,396

Chargeable general costs in 2.1: $13,596

(b) Direct costs

Direct costs incurred in program 2.1 are:

Angoff, Goldman

A nonchargeable expenditure was made for legal services in connection with Q-3.

Expenditure $668

Chargeable cost $ 0

Sherin and Lodgen

In response to a MTA auditor's inquiry, the firm wrote an audit letter concerning potential liabilities for any matters handled by the firm.

Expenditure $100

Chargeable cost $100

Angoff, Goldman

An expenditure was made for two legal matters. The MTA paid $380 for a Q-3 issue. The second charge involved arbitration of a MCCC grievance, at $632. Although the MCCC grievance matter is more appropriately allocated to program 1.2, I permit its inclusion here, as it is a facially chargeable item.

Expenditure $1,012
Chargeable cost $ 632

Bateman & Slade

The costs of printing the service fee tax brief are nonchargeable.

Expenditure $ 506
Chargeable costs $ 0

Ernst and Young

A payment to the MTA's auditors is found here. I conclude that the charges are associated with agency service fee and related audit matters.

Expenditure $10,680
Chargeable costs $10,680

Total direct costs in 2.1: $12,563
Chargeable direct costs in 2.1: $11,412
Total chargeable costs in 2.1: $25,008

Program 2.2: Advice to Affiliate Services.

(a) General costs

The general areas of legal services activity allocated to program 2.2 are as follows:

Higher education

At the higher education October retreat, Clarke presented proposals for reorganizing Massachusetts' public higher education. A previous 1980 higher education reorganization had a major impact on higher education collective bargaining agreements. See Board of Regents, 9 MLC 1748 (1983). Since restructuring has foreseeable collective bargaining consequences, informing higher education representatives about restructuring proposals is reasonably related to the Union's role as an exclusive bargaining representative and, therefore, is chargeable activity. In fact, a higher education reorganization occurred in July 1991. Additionally, Clarke

provided advice on the higher education funding crisis and the furloughs, including a presentation on the matters at a December HELC meeting.

The MTA's activities on behalf of its higher education locals include political activity for lobbying in the context of contract ratification or implementation and, therefore, fit within the Lehnert exception to the general nonchargeability of political activity. Lehnert, 500 U.S. at 522. The state legislature is the funding body for the higher education bargaining units and measures were undertaken to execute and secure funding for successor contracts before the anticipated change in administration occurred. The MTA's furlough litigation led the Supreme Judicial Court to hold that Governor Weld's legislation unconstitutionally impaired the higher education contracts. Massachusetts Community College Council, et al. v. Commonwealth of Massachusetts, 420 Mass. 126 (1995). Indeed, the furlough decision defines the boundary of legislative power over collective bargaining agreements. Therefore, I consider all of Clarke's advice and presentations on higher education matters in program 2.2 to be chargeable.

Other advice to Affiliate Services

Clarke provided chargeable advice germane to collective bargaining directly to Bonazzi, the regional managers and field representatives on health insurance, funding contracts with local school committees, and cafeteria benefit plans. I consider nonchargeable and delete .2 hours, at $16, for a Q-3 campaign finance discussion and .5 hours, at $42, for advice related to the wages of MCCC employees who, at some point, engaged in a strike. Finally, I delete 2.5 hours of activity charged to 2.2 spent in connection with the constitutional amendment, at $183.

Agency fee

I consider Clarke's agency fee activity and litigation, which is allocated to 2.2, to be chargeable. In addition, the responses to the Commission's proposed changes in regulations concerning, among other things, agency fee matters are also chargeable.

Health insurance

The upsurge in interest in health insurance issues has been previously described. Health insurance is a mandatory subject of bargaining, Town of Ludlow, 17 MLC 1191 (1990), and is a complex benefit and bargaining subject. Staff Attorney Williams provided on-going legal advice to MTA field staff regarding health insurance benefits, an activity that was directly related to collective bargaining and is fully chargeable.

Teacher salaries opinion

Staff attorney Riley allocated time to legal advice concerning teacher salaries to program 2.2, rather than the more appropriate 1.2 allocation. Since his activity is facially chargeable, the misallocation is insignificant.

Municipal bankruptcy

Staff attorney Salini provided legal advice on municipal bankruptcy to Affiliate Services staff. The consequences and implications of a municipal bankruptcy are facially related to collective bargaining.

General costs in 2.2: $16,821

Chargeable general costs in 2.2: $16,580

(b) Direct costs

The sole direct cost in program 2.2 is:

Mintz, Levin

A master health and welfare trust agreement and related materials were prepared for distribution to the field staff for use in collective bargaining.

Expenditure	$ 1,611
Chargeable cost	$ 1,611

Total chargeable costs in 2.2: $18,191

Programs 2.3 and 2.7: Advice to Governmental Services.

Clarke used subprograms 2.3 and 2.7 to denote and segregate her political activity. For example, while she generally allocated advice to MTA President Bacon to program 2.6, if her advice concerned ballot questions or other external electoral issues, she allocated her time to 2.3 or 2.7. Subprograms 2.3 and 2.7 included Clarke's advice to Governmental Services regarding legislation, ballot issues, elections and campaign finance. Clarke advised locals and MTA staff on statutory limitations on political activity by public employees in the context of the Q-3 campaign, and distinguished such advice from general 2.1 legal advice to locals. Finally, Clarke prepared the MTA's periodic filings with the state's Office of Campaign and Political Finance under program 2.7. Two legal interns spent a total of 8.5 hours in these political subprograms on the constitutional amendment.

The MTA did not charge for activity in these two subprograms, See MTA #1. A few instances of misallocated political activities have been discussed. Clarke's erroneous charge of 2.5 hours for constitutional amendment activity to program 2.2 has been addressed. Misallocated Q-3 activity has been deleted from 2.2. Finally, Clarke allocated 2 hours to program 1 for advising two locals on political matters.

Clarke offered the legal staff the opportunity to volunteer to work on the Q-3 campaign but the staff

largely declined her invitation. On election day, staff worked a total of 39 hours at the polls, at a cost of $3,301. Attorneys Salini, Cenci, Riley and Weissinger reported a total of 11.5 hours in connection with Q-3, valued at $973. All of the Q-3 hours were carried as 9.9 time, which was proportionally spread among the subprograms. Therefore, I delete 10%, or $427, of the costs of the Q-3 time from the chargeable program 2 total, because only approximately 10% of the original political activity was proportionally allocated to program 2.

Linda Kaminski, the administrative supervisor, worked at TEAM from October 5, 1990 through November 6, 1990, at a cost of $18,845.[57] Kaminski and three division secretaries worked at the polls or at TEAM on election day, at an additional cost of $2,692.[58] One secretary was paid $180 from the legal division's accounts for other Q-3 activity. Since all clerical salaries are proportionally spread among the legal division's subprograms, I delete 10% of the costs, or $2,172, of their political time from program 2.

Program 2.4: Advice to Professional Development.

All of the time allocated to 2.4 was related to Williamstown and TASCs. Attorneys Healey, Riley, Cenci, Salini and Williams prepared and presented the Williamstown Legal Track. The Summer Leadership Conference topics included assault and battery between teachers and

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[57] This figure reflects 28 eight-hour days (a reasonable industry standard), at $84.13/hour, the average value-per-hour for programs 2.3 and 2.7.

[58] The total reflects 4 individuals, working an 8 hour day, at $84.13/hour, the value-per-hour average of the political activity subprograms.

students, health insurance and collective bargaining, Proposition 2½, the state fiscal crisis and funding collective bargaining agreements, the distinction between work-to-rule activities and unlawful work stoppages, and teacher layoffs. All track topics are facially chargeable.

Two attorneys addressed TASC meetings. Healey gave a presentation on the legal implications of teachers dispensing medicine to students and Williams spoke about health insurance issues. Both presentations are facially related to collective bargaining concerns.

There are no direct charges in program 2.4.

General costs in 2.4: $5,309

Chargeable costs in 2.4: $5,309

Program 2.5: Advice to Other Divisions.

Advice given to Communications, Finance and Accounting and the Educators Service Corporation (ESC) are allocated to program 2.5. Clarke spent 10 hours, at a cost of $838, on ESC matters in 1990-91.[59] Legal interns devoted 26 hours to ESC matters, at a cost of $2179. Intern costs are treated as unallocated wages that are spread proportionally over the subprograms. Therefore, 10% of the ESC time, or $218, will be deducted from the costs of the subprogram. Finally, Clarke allocated .3 hours spent reviewing materials concerning the Teachers Trust Fund to 2.5, rather than to 2.1. The $25 cost of the misallocation is deleted.

There were no direct costs in 2.5

General costs in 2.5: $2,171

Chargeable costs in 2.5: $1,090

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[59] ESC paid a $4,000 management fee to the MTA, to include Clarke's legal services. This fee was netted from the costs of the division in MTA #1.

Program 2.6: Advice to Governance.

Clarke allocated her time advising President Bacon, the MTA Board and the MTA Executive Committee to this subprogram. Also included here is Clarke's preparation time for the Annual Meeting, and her activities as staff consultant to the Bylaws and Rules Committee and Hearings Committee. The Hearings Committee brings recall proceedings against officers or the Board, if necessary. The Bylaws and Rules Committee reviews proposed amendments to the MTA's bylaws and makes recommendations in that regard.

Clarke attended Board and Executive Committee meetings at the request of Sullivan or Bacon when they envisioned the need for legal advice during the meeting. I credit Clarke's testimony that she often floated in or out of the meetings, depending on their content. It was Clarke's practice to allocate different program numbers to the specific things she did at the meetings. She allocated her 5 minute presentation on the McDuffy litigation and her furlough litigation report to 2.6, rather than their respective case numbers, because she was providing an update to the elected leadership, not working on the cases. I will not adjust Clarke's time allocations due to her brief updates about nonchargeable activity at governance meetings. With the one exception discussed below, Clarke's 2.6 activities are adjuncts to internal governance functions that relate solely to running and perpetuating the Union as an entity. As such, they are chargeable.

Clarke spent 1.4 hours advising MTA President Bacon concerning a notice of deposition Bacon received in Democratic State Committee v. Kaufman. While the deposition never took place, the notice stemmed from Bacon's attendance at the State Democratic Convention.

Since the legal advice resulted from Bacon's purely political conduct, I delete its cost, $117, from this subprogram.

There are no direct costs in 2.6.	
General costs in 2.6:	$ 5,519
Chargeable costs in 2.6:	$ 5,402
TOTAL COSTS IN 2.0:	$81,387
Subtotal chargeable costs in 2.0:	$56,087
Less 10% of 9.9 time	($2,599)
TOTAL CHARGEABLE COSTS IN 2.0:	$53,488

Program 3.0: Division Administration.

(a) General costs

Clarke is the only attorney that allocates time to program 3.0. Her 3.0 charges include preparing the division's budget, reviewing time and expense accounting, supervising employees, assigning and reviewing cases and tasks associated with generally running the division.

The legal division administers the Association Professional Liability Program (APL), which provides insurance coverage for staff and officers of the MTA and its affiliates in connection with Association activities, and the Educators Employment Liability Program (EEL), a benefit of membership providing coverage for defense in employment-related criminal, and certain civil, matters.

Relying upon Commission Rule 17.04(1)(3), 456 CMR 17.04(1)(3), the MTA asserts that a members-only benefit is nonchargeable if it is available only to union members and is not germane to the governance or duties of the bargaining agent. See also, Newton I, 13 MLC 1595, n.5. However, Rule 17.04(1)(3) does not appear to fully comport with recent agency fee developments and

their governing rationale. Indeed, courts that have considered the question have held that members-only benefits are nonchargeable. See e.g., Albro, 585 N.E.2d at 673-674 (since members-only benefits are neither germane to collective bargaining nor concern a free rider problem, they are nonchargeable); Bromley, 843 F. Supp. at 1156 (as a matter of law, members-only benefits are nonchargeable).

I do not delete the 1.4 hours spent on the members-only EEL program from program 3.0, however, because Program 3.0 is proportionally chargeable; that is, it will be chargeable in proportion to the overall chargeable activity undertaken by the Legal Services Division, unless a different allocation has been established by record evidence. The 1.4 hours of EEL activity is insufficient to affect the proportional chargeability of program 3.0.

General costs in 3.0: $41,715[60]

(b) Direct costs

The following direct costs are contained in the legal services 3.0 account:

Attorney training

For attendance at professional conferences and seminars.

Expenditure: $5,870

Professional dues

Dues for the Boston Bar Association, the Massachusetts Bar Association, the Labor Guild, the Board of Bar Overseers and the American Bar Association.

Expenditure: $5,297

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[60] This figure includes the 13 hour allocation originally found in program 2.1, at $1,087.

Subscriptions

For law library materials, including West's, Shepard's and the Social Law Library.

Expenditure:	$ 18,930

MTASO Training

Expenditure:	$ 551

Management Training

Expenditure:	$ 438
Total direct costs in 3.0:	$ 31,087
TOTAL COSTS IN 3.0:	$ 72,802
Total costs in programs 1 and 2:	$1,538,093
Chargeable costs in programs 1 and 2:	$ 53,488
Chargeable proportion of Legal Services costs:	3.5%
Chargeable costs in 3.0:	$ 2,548

CHARGEABLE COSTS OF THE DIVISION OF LEGAL SERVICES

Total Costs:	**$1,610,896**
Chargeable Costs:	**$ 56,036**

VII. DIVISION OF GOVERNMENTAL SERVICES

The MTA is seeking no agency service fee in connection with its political action division.

CHARGEABLE COSTS OF THE DIVISION OF GOVERNMENTAL SERVICES

Total costs:	**$1,427,844**
Chargeable costs:	**$ 0**

VIII. DIVISION OF COMMUNICATIONS

The Communications Division writes and produces most MTA publications, designs public relations campaigns, interacts with the press and helps the local associations develop similar skills for use in their local communities. Communications' functions fall within two categories: internal communications, involving material that is geared towards the MTA's membership; and, external contacts, including media and public relations.

During 1990-91, Communications had a staff of seven: Steve Wollmer, the director; Andrew Linebaugh, the editor; Jack Polidori, Penny Schwartz and Jerome Spindel, consultants;[61] a staff assistant and a division coordinator. Wollmer, Linebaugh, Spindel, Schwartz, Plati and Polidori kept time and expense reports.

The direct costs of tangible Communication products, such as printing, mailing and photography, were allocated in one of four ways. First, when the MTA's internal Printing and Mailing department printed a job, the costs of labor, postage and supplies generally remained within the Printing and Mailing budget.[62] Second, Printing and Mailing "charged back" the direct costs (but not the labor

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[61] Spindel replaced Schwartz, who had been filling in for him while he was on leave, in February. Schwartz returned to Affiliate Services.

[62] A document is sent to Printing and Mailing with a "job ticket" containing instructions and the account prefix (such as MA8) of the division requesting the services. Printing and Mailing would produce an "invoice" for each job, listing the division making the request as the purchaser. However, an "invoice" is not a debt statement like a true invoice; instead, it is an internal record keeping document.

costs) of some publications to the appropriate account in Communications. Next, some direct costs, such as the cost of external production, like printing MTA TODAY, remained in Communications. Finally, some direct costs were allocated to other MTA divisions.

As a general rule, a union's publications are chargeable to the extent that they report on chargeable activities. Ellis, 466 U.S. at 450-451. A review of the MTA's publications is guided by the court's Lehnert plurality opinion, permitting charges for articles that are neither political or public in nature but are informational support services, for the benefit of all. Under this standard, portions of the Michigan Education Association's newspaper concerning teaching and education generally, professional development, advice on unemployment and job opportunities and award programs for the MEA were chargeable. Lehnert, 500 U.S. at 529.

Activities in the Communications Division:

Program 1.1: MTA TODAY.

Communications produces MTA TODAY, the MTA's monthly tabloid newspaper. The MTA produced its usual eight annual issues of MTA TODAY in 1990-91. While the entire division works on MTA TODAY, it is Linebaugh's primary responsibility and he devotes about 60% of his time to its production.

MTA TODAY averages between 30 and 35 pages per issue, with each page containing four 14-inch columns or 56 column-inches. Regular features include articles on professional development, members' rights, retirement, personal finance, NEA matters, a calendar of coming events, obituaries and classified ads. Feature stories in 1990-91 included reports of local contract disputes, issues in education, profiles of individual teachers' accomplish-

ments, classes and fellowships available to teachers, and the MTA's legislative agenda and political campaigns.

Communications sells ad space in the MTA TODAY, both to ESC and outside parties. The cost of the ad space is fixed, irrespective of its placement in the paper. The division received $49,308 in ad revenue in 1990-91. A few subscribers to the paper brought an additional $190 in revenue. The paper is sent free to some legislators, school superintendents, school committee members and Department of Education personnel. Its circulation of 68,000, however, automatically includes only members of the MTA. Indeed, the parties stipulated that receipt of MTA TODAY is a members-only benefit. A subscription is $10 annually for nonmembers; while individual copies are $1 each.

While conceding that the MTA TODAY is sent to members only, the Union argues that because it is germane to collective bargaining its publication costs are chargeable to nonmembers. I disagree. Instead, I decline to permit charges for this general circulation publication that is not provided to nonmembers. See Dalan and East St. Louis Federation of Teachers, 10 PERI 1078 (1992). See also, Lehnert, 643 F. Supp. 1306, 1328 (W.D.Mich.1986), aff'd, 881 F. 2d 1388, 1392 (6th Cir. 1989), aff'd in part, rev'd in part, 500 U.S. 517 (1991) (available to all bargaining unit members, union's primary publication, "Teachers Voice," is chargeable to extent that it chronicles chargeable activity).

However, I understand that the present case will not only set the appropriate fee rate for the years covered by the parties' settlement but it will also be instructive in future chargeability disputes. Therefore, although I consider the members-only distribution restriction to be

dispositive of the MTA TODAY's chargeability, I will review the pending chargeability disputes on an issue-by-issue basis.

In 1990-91, the MTA TODAY consisted of 14,336 column-inches, of which 3,275 were paid advertisements. Since the MTA did not originally offset the cost of advertising revenues from its divisional costs in MTA #1, the Charging Parties consider ad space nonchargeable. (Reply Brief, p. 40-41). The MTA argues that ad space is immaterial to the chargeable/nonchargeable equation because it represents the advertiser's, not the MTA's, activity. Therefore, the MTA deletes all ad space from the total column inch MTA TODAY count and nets out the corresponding ad revenue. Finally, the MTA suggests that the "To place an ad" feature of each issue is overhead, like the logo and masthead, and should similarly be deleted from the chargeable/nonchargeable calculation. (MTA Brief, p. 220-221).

I consider the MTA's approach to be reasonable and appropriate. Synthesizing the MTA and the Charging Parties' witness testimony and reports, an overview of the MTA TODAY chargeability dispute follows:

Total column-inches:	14,336
Less advertising:	(3,275)
Less overhead:	(422)
Chargeable/nonchargeable column-inches	10,639
Agreed to be chargeable	3,602
Agreed to be nonchargeable	4,488
In dispute	2,622.5

MTA Exhibit 2

The following disputed articles are chargeable:

1) Health insurance program recap, providing explanations and background for the current collective bargaining climate, as well as possible solutions.
2) Recommendations concerning certification proposals affecting conditions of employment of bargaining unit administrators.
3) Josephine Bernard profile, recounting educator's achievements.
4) Membership Assistance Program, information about a chargeable Affiliate Services program.
5) Professional Development Better Ideas Grant.
6) Higher education funding program at Williamstown, ½ chargeable, mixed working conditions and Q-3 content.

Nonchargeable items include:

1) Project TEACH application, a Professional Development program, requiring a nonmember surcharge for attendance. See, Professional Development program 2.3, infra.
2) Application for Framingham State course, also requiring a nonmember surcharge. See, Professional Development program 2.1, infra.
3) Thinking about retirement, a members-only benefit.
4) NEA Education Reform.

A total of 131 additional column-inches will be added to the chargeable total from the August 31, 1990 issue of MTA TODAY. I am persuaded that the electoral calendar had only an incidental impact on the timing of the publication since the initial MTA TODAY was published annually in the same time frame.

MTA Exhibit 3

I would include the following articles in the chargeable count:

1) Brockton financial crisis affecting wages and working conditions.
2) Curriculum package for students featuring the legislative process, sponsored by the Secretary of State.
3) Higher Education budget with only incidental Q-3 reference.

An additional 129 column-inches have been added to the chargeable total from the October 12, 1990 issues. The sole, new nonchargeable item concerned a thank-you to Senate President Bulger.

MTA Exhibit 4

The chargeable articles here include:
1) Update on upcoming television special on teachers.
2) Retirement credit legislative update, concerning benefits of bargaining unit employees.
3) Contract settlement report, Blackstone/Millville.
4) Chart on support for higher education.
5) NEA higher education conference report.
6) Report on certification changes.
7) Delegate nomination for annual meeting.
8) October higher education conference report.
9) Special education survey report, ½ chargeable. An article describing survey findings and urging involvement in the Department of Education's regulatory changes.

Nonchargeable items included:
1) Salisbury override reports.
2) Children's Defense Fund conference.
3) Amnesty International newsletter and curriculum.

The chargeable column-inch total of the November 27, 1990 publication will be increased by 267 inches.

MTA Exhibit 5

Disputed items that are chargeable include:

1) Report on activities including ULP charge and contract dispute, 3/4 chargeable; photo and caption pertaining to the Winchester sick out are nonchargeable.
2) NEA Learning lab initiative.
3) Medford contract dispute and informational picketing.
4) National Governors' Association's education reform proposals and NEA's response. Unlike the NEA education reform articles, which I considered nonchargeable because they explained and advanced only the affiliated organization's perspective, here the story provides information concerning education reform proposals currently in debate in the public arena, with analysis and counterpoints.

An additional 261.5 column-inches will be in the December 28, 1990 edition's chargeable total. The notice about the members-only Educators Employment Liability Policy is not chargeable.

MTA Exhibit 6

Included in the chargeable articles are:
1) Winchester contract funding account.
2) Randolph insurance settlement, ULP settled.
3) Somerville informational picketing.
4) Report on reorganization proposals in higher education.
5) Furlough letter to editor, urging lawful collective action if furlough legislation is enacted.
6) Announcement of retirement conference. First-come, first-served admission; not a members-only benefit.

An additional 115 column-inches are chargeable in the February 11, 1991 MTA TODAY.

MTA Exhibit 7

The following items are chargeable:
1) Furlough explanation.

2) NEA higher education conference announcement.
3) Stoughton collective activity.
4) Discussion of Mentor Teacher and certification proposals.
5) Higher education reorganization testimony, ½ chargeable.
6) "Public employees take a hit," ½ chargeable.
7) Guideposts to unite higher education affiliates ¼ chargeable.

A further 199 column-inches will be added to the March 21, 1991 edition's total.

MTA Exhibit 8

Included in the chargeable totals are:
1) Reports of elimination of music and art programs.
2) Announcement of video and film program.
3) Anniversary of Trustees of Reservations events.
4) Photo of retirement conference.
5) Announcement of program seeking advocates for special education students.
6) Examination of impact of cuts in music and art programs.
7) Report of National Commission on Music Education (NCME).
8) Report on the symposium of NCME.
9) Report of state auditor on restructuring special education.
10) Sullivan's editorial, ½ chargeable.

Another 327 chargeable column-inches are contained in the April 18, 1991 MTA TODAY. The NEA Goals 2000 spread, however, is nonchargeable.

MTA Exhibit 9

The following disputed items are chargeable:
1) Impact of Savoy's budget cuts.

2 Text of Annual Meeting speeches, because entire conduct of annual meeting is chargeable.

3) EAW grievance settlement.

4) Poll of Malden voters, in face of request to re-open contract.

Nonchargeable items include:

1) UMass 2-day action report. As discussed in Affiliate Services, the concerted action was nonchargeable.

2) Amherst override report.

The chargeable total in the final June 11, 1991 edition increases by 300 column-inches.

The final chargeable total or MTA TODAY column-inches is 5,420, a total of 50%. Therefore, assuming, arguendo, that the MTA TODAY was not a members-only benefit, the following chargeability calculations would occur:

Direct Costs of 1.1:			$183,945
Postage	$ 40,274	Mailing	$13,211
Printing	$121,995	Photos/Art	$ 8,494
General costs in 1.1:			$106,262
Subtotal costs in 1.1:			$290,207
Less revenue:			($ 49,498)
Total Costs in 1.1:			$240,710
Chargeable percentage of MTA TODAY			50%
Total hypothetical chargeable costs in 1.1:			$120,355
CHARGEABLE COSTS IN 1.1:			$ 0

Program 1.2: Frontline.

The MTA produces a newsletter for its local leadership, entitled Frontline, with a circulation of 4,500. Frontline is again edited by Linebaugh who, in 1990-91, composed six editions. Each issue has four letter-sized pages, consisting of 20 column-inches. The publication is

produced by Printing and Mailing, but the costs remain in the Communications program 1.2 budget. As an internal MTA leadership communique, Frontline's costs are chargeable to the extent that it reports on chargeable activity.

In 1990-91, Frontline consisted of 480 total column-inches, of which 86 were overhead. Again, the Charging Parties and the Union divided the column-inches into the following categories:

Total column-inches:	480
Less overhead:	(86)[63]
Chargeable/nonchargeable column-inches:	395
Agreed to be chargeable:	65.5
Agreed to be nonchargeable:	241[64]
In dispute:	110

By issue, the following articles are in dispute:

MTA Exhibit 10

There is no dispute concerning this edition.

MTA Exhibit 11

The article concerning American Education Week is not chargeable, due to Lehnert's prohibition against charging for expenditures "designed to enhance the reputation of the teaching profession." Lehnert 500 U.S. at 528.

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[63] Again, I accept the MTA's reasonable method of calculating the chargeable proportion of its publication. However, I accept the Charging Parties' overhead inches count.

[64] In its brief, the MTA concedes that several additional articles, overlooked in its original count, were nonchargeable.

MTA Exhibit 12

The "Controlling the crisis" article appears more geared to strike and other drastic situations than to more common, cyclical collective bargaining crises. Therefore, it is nonchargeable. However, the "Starting from Scratch" report is applicable to all collective bargaining and potential crisis situations and, thus, is chargeable. The professional development grant announcement is chargeable, while the report on "electronic scabbing" is not. Therefore, an additional 8.5 column-inches will be placed in the chargeable total.

MTA Exhibit 13

The professional development grant announcement concerns both professional development and working conditions and is chargeable. The information concerning the conduct of contract ratification meetings and the announcement about a graduate course are likewise chargeable, as is the book announcement. The public relations grant announcement and report on the book mark distribution are not chargeable, however, because the underlying activities concern general publicity for, and awareness of, the teaching profession. The total chargeable count will be increased by 18 column-inches.

MTA Exhibit 14

Chargeable disputed items include the Better Ideas conference announcement; a report on a study of student achievement in relation to classroom size (with its suggestion about its use at the bargaining table); and, dates of pre-convention meetings for the MTA's Annual Meeting. Nonchargeable items include the "Communications Ideas" announcement, focusing on local external media relations; the NEA's reaction to minority scholarship limits;

and, an announcement for National Teacher Day. A total of 17 column-inches will be added to the chargeable total.

MTA Exhibit 15

The announcement for first-come, first-served job-hunting seminars for laid-off teachers is chargeable, as is the Williamstown announcement. However, the report on striking teachers in Washington, protesting levels of state funding, is not. The chargeable total will be increased by 24 column-inches.

Total chargeable column inches: 133

Direct costs in 1.2: $5,503

Including $2,154 in charge backs from the Printing and Mailing division, copyright payments and postage costs.

General costs in 1.2: $3,524

Total costs in 1.2: $9,027

Chargeable percentage of 1.2: 34%

TOTAL CHARGEABLE COSTS IN 1.2: $3,069

Program 1.3: MTA Calendar Handbook.

The MTA's annual pocket calendar is sent with the other membership materials in late August and is received directly only by members. The calendar contains a directory of MTA services, offices and leadership and notes dates of importance within the MTA, like conferences and Board meetings.

I reject the MTA's argument that this members-only benefit should be considered germane to collective bargaining and, therefore, chargeable. Instead, it is nonchargeable on two grounds: first, as detailed previously, I decline to consider members-only benefits chargeable, irrespective of the Commission's earlier test; and, second, the calendar appears to be a membership recruit-

ment and promotional device, included in the annual fall membership mailings, presumably as a "thank you" token for members. Therefore, like the activities contained within the division's program 1.5, infra., the calendar is nonchargeable.

The calendar's direct costs of $21,919 were for design and printing services. The calendar ad revenue was not originally netted from the total detailed in MTA #1.

General costs in 1.3:	$ 262
Subtotal costs in 1.3	$22,181
Less ad revenue ($ 3,000)	
Total costs in 1.3:	$19,181
TOTAL CHARGEABLE COSTS IN 1.3:	$ 0

Program 1.4: Local Assistance and Training.

The MTA listed program 1.4 as nonchargeable in its demand, MTA #1. Now, however, the MTA seeks to charge for aspects of its program 1.4 endeavors, arguing that the record evidence reveals considerable chargeable local assistance activity. The Union asserts that it is not precluded from proving that some costs first designated nonchargeable were in fact chargeable, provided that the total fee does not exceed the fee demanded. The MTA points to the reasoning and result in Kantrovich and Maine Teachers Association, 10 PERI 1022 (IELRB, ALJ, 1993) aff'd 10 PERI 1085 (1994), in support of its position. (MTA Brief, p. 235-236).

In some instances, it may be appropriate to permit a union to collect a fee from an area originally designated nonchargeable. However, I will not permit the MTA to charge for its program 1.4 activities here. In addition to its nonchargeable designation in MTA #1, the MTA reiterated that position at the present hearing. In response to an objection about program 1.4 testimony, the MTA

essentially indicated that program 1.4 information was being elicited only for overview purposes. (Transcript, p. 1215). Moreover, I note that all information cited by the MTA in support of chargeable 1.4 activities is contained in documentary exhibits (MTA Brief, p. 236-239). Since the Charging Parties were undoubtedly unaware of the MTA's intention to seek charges for program 1.4 activities until they received its post-hearing brief, they were denied the opportunity to probe the Union's documentary chargeability assertions. Therefore, I consider the Charging Parties to be unduly prejudiced by the MTA's desire to now seek program 1.4 charges.

Total costs in 1.4:	$114,354
TOTAL CHARGEABLE COSTS IN 1.4:	$ 0

Program 1.5: Membership material.

Communications produced the packets of material illustrating the benefits of membership that are distributed each fall, with the costs attributed to program 1.5. In addition, Maria Plati produced MTA Insight, a newsletter for employees in MFT-affiliated locals. The newsletter is used as an organizing tool. The MTA seeks no charge for program 1.5.

Total costs in 1.5:	$28,517
TOTAL CHARGEABLE COSTS IN 1.5:	$ 0

Program 1.6: Internal Communications/Division Support.

Activity undertaken in support of other divisions within the MTA and internal public relations matters are allocated to this subprogram. Communications produces written materials for the Annual Meeting, the NEA Convention and the Williamstown conference. The division writes speeches, memoranda and mailings for the Union's governance personnel, and produces flyers and brochures for the Professional Development and Govern-

mental Services divisions. In 1990-91, program 1.6 included expenditures in support of the MTA's political campaigns.

Wollmer and Polidori were members of the Anti-CLT Planning Committee and Communications produced voluminous material for the Q-3 campaign. Major Q-3 campaign publications included:

1) Question 3 Updates: Ten newsletters about the campaign were sent to local presidents and MTA officers and staff from September 6, 1990 through November 9, 1990.
2) Question 3 Campaign Manual for Local Association Presidents/Local Association Leaders: Three-ring manuals were distributed at Williamstown and to the local presidents at the regional Q-3 meetings in late August.
3) Cards: Survey cards were a major aspect of Phase I of the Q-3 campaign.
4) The "AMMO" Book: The 21-page "AMMO" Book contained a Q-3 analysis and answered questions about the referendum, from research Wollmer compiled. The book was originally developed for local officers and distributed at the August regional meetings, but was later distributed upon request.
5) Answering Those Difficult Questions About Question 3: A three page piece distributed at Williamstown and at the regional meetings.
6) Video on Q-3: Communications produced a video with media consultant Ken Swope. The video was shown and distributed to local presidents, with instructions for membership viewing.

7) Campaign Guidelines for "Operation Reveille" Local Coordinators: A multi-page manual distributed at the beginning of Phase II of the campaign.
8) "Dear Friend" Cards: Phase II of the campaign envisioned that volunteers would send postcards to 15 friends, asking them to vote "No" on Question-3. The printing and postage expenses associated with this mailing were allocated to Governmental MC0-C2-25-520.

Communications produced further Question-3 material including: various memoranda from Bonazzi; flyers; a phone script; voter registration information; direct-mail pieces; a button; and, a bumper sticker.[65]

Wollmer and Polidori, like others on the Anti-CLT Planning Committee, became members of the Reveille Planning Group, after the Q-3 campaign. The division produced two drafts of training documents, charged to program 1.6.

Communications produced material in support of the Penny on the Sales Tax campaign, including: Local Presidents' Instructions; Association Representatives' Instructions; Instructions for Community Organizers; Questions and Answers; School System Status Report; Explanation Booklet; Letter-Writing Instructions; a sample postcard; and, a telephone tree for local presidents. The division also produced, or assisted in the production of

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[65] I credit Strecker's explanation that she specifically identified only the enumerated campaign materials because they were the "major components of educating and motivating the membership."(Transcript, p. 5612). I do not regard her omission of other campaign materials to be an attempt to disguise or diminish either the extent of the campaign or of Communications' campaign work product.

direct mail pieces, overheads, various memoranda for Bonazzi, and a sample op-ed piece. The publications, and the underlying staff time, were charged to program 1.6. Wollmer also worked with Marttila and Kiley on the Penny public opinion poll and helped with the regional presidents' meetings.

Polidori and Wollmer helped plan the MTA's campaign over the state's fiscal year 1992 budget. Polidori attended Higher Education Leadership Council meetings and helped formulate internal communications concerning the collective bargaining situation, the furloughs and tuition levels.

Throughout the spring of 1991, Communications produced a newsletter on the fiscal year 1992 state budget for the local leadership. It also composed memos for locals; a memo to the legislature; and a series of transparencies. The higher education newsletter was charged to program 2.1, while the costs of the remaining materials were allocated to program 1.6.

Time spent as staff consultants to MTA committees was also allocated to program 1.6. Polidori was consultant to the Business Relations Committee, a Governance special project designed to look into business-teaching partnerships. Linebaugh served as consultant to the School Nurse Study Committees and the Resolutions Committee, a Governance group that reviews proposed Annual Meeting resolutions. Other division projects allocated to program 1.6 included: a public relations program emphasizing teamwork; fund raising events for the Teachers Trust Fund; and, redesigning the MTA business cards.

In preparation for the hearing, Wollmer reviewed his staffs' time records and calculated the number of hours

that each individual spent on chargeable program 1.6 activity. The result was:

Wollmer: 116.25 hours
Polidori: 327.25 hours
Linebaugh: 143.57 hours

No other Communications staff member spent time on program 1.6 activities.

In reviewing his own time sheets, Wollmer referred to his contemporaneous notations to determine whether the activity was political. He excluded his work as a staff consultant to the Communications Council, an activity that, as a Governance committee, would be proportionally chargeable. Wollmer also excluded his attendance at a Statewide Crisis Committee meeting, and some budget background work. All activities connected with Q-3, CLT, Reveille, Penny or Governmental Services were excluded from the Communication staffs' chargeable tallies.

I overrule the Charging Parties' objections concerning Wollmer's program 1.6 chargeable activity classifications and, in general, concur with Wollmer's designations. I credit his explanation that he attended governance meetings as Director of the Communications Division, irrespective of the meetings' content, and allocated his attendance to Program 1.6. I consider such attendance chargeable, notwithstanding any incidental political discussion.[66] Wollmer's time sheets generally identify, and segregate, Q-3 or CLT activity. Therefore, I permit his separate 1.6 charges for governance meetings, which may also include conferences with Bacon or Sullivan. Finally,

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[66] For example, although Wollmer answered questions on the Q-3 campaign at the September 21, 1990 Executive Committee meeting, the meeting minutes indicate that the Q-3 discussion was only a portion of the evening's business.

charges for Wollmer's activities in conjunction with the Professional Development and Research divisions will be permitted.

Polidori's general higher education assignments are chargeable.[67] I also consider his work as a consultant to the Business Relations Committee to be chargeable. The MTA argues that Polidori's activity concerning the state budget issue should be chargeable, because it was inexorably intertwined with his on-going assignment to assist the higher education effort to achieve collective bargaining agreements. However, I note that Polidori made a distinction between his higher education work and the state budget issue. Moreover, the evidence here is insufficient to indicate that Polidori's budget work was geared to the higher education contract funding and furlough issues, rather than being a more general battle concerning educational revenues. Therefore, I delete a total of 56 hours, spent on state budget matters between February 4 and June 12, 1991, from Polidori's chargeable program 1.6 activity. I also delete 6 hours spent, on November 30, 1990, at a Q-3 debriefing meeting.

Finally, I permit charges for Linebaugh's activities with the Resolutions Committee, the School Nurses Study Committee and, in general, for his meetings with governance officials. However, I delete 5.75 hours, on April 30, 1991, for activity denoted "Board, Human And Civil" that appears to relate to the Human Relations Council, for which the MTA seeks no fee.

TOTAL CHARGEABLE
HOURS IN 1.6: 519 = 23% of total hours

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[67] I note that Polidori's involvement in the NEA Higher Education Conference, a chargeable matter, is not included in the designation of his program 1.6 chargeable activities.

Direct costs in 1.6:

The only direct costs that remained in the division were for miscellaneous items, like couriers, taxis and Federal express; and payments of $200 and $185 to Boston Press Photographers, Inc. and the New England Broadcasting Association, respectively. The direct costs totalled $968.

The direct costs of producing Communications' tangible program 1.6 material were charged to other divisions, as follows:

1) The direct costs of the major Q-3 campaign pieces, including printing, postage and labor, were allocated to MC0-C2-25-520, an account for statewide referenda in Governmental Services.
2) Some of the direct costs of the Penny Campaign were allocated to Affiliate Services, as previously described. Four direct mail pieces were produced by the Campaign Performance Group; their $14,578 fee was allocated to Affiliate Services account MA8-A1-13-650. Payments to Universal Badge and Harwich Lithographic, for Penny materials, were allocated to the same Affiliate Services account.
3) The direct costs of producing all other Q-3 and political materials remained in Printing and Mailing.

I am persuaded that it is reasonable to charge for the miscellaneous 1.6 direct costs in proportion to the program's chargeable activity.

Total costs of 1.6:	$133,475
Total direct costs of 1.6:	$ 968
Chargeable direct costs of 1.6:	$ 223

TOTAL CHARGEABLE COSTS OF 1.6: $ 30,460[68]

Program 2.1: Media Relations.

Communications functions as the MTA's press office, in charge of all aspects of media relations. Until election day, most of the division's program 2.1 activity related in some manner to the Question-3 campaign. MTA President Bacon gave interviews and appeared on radio and television talk shows. Press releases were also issued and press conferences arranged, local associations received help with community media contacts and Maria Plati was assigned to work full-time for the Tax Equity Alliance of Massachusetts. Similar efforts were made on behalf of the Penny Campaign.

The MTA does not seek a fee for Program 2.1.

Total costs of 2.1: $ 68,954

TOTAL CHARGEABLE COSTS OF 2.1: $ 0

Program 2.2: Communication Council.

The Communications Council administers the MTA's Public Relations Grant Program, under which grants are available to local associations for their proposed public relations projects. The Council made over 100 grants in 1990-91, for such projects as a Teacher for a Day program, American Education Week banners, senior citizen's breakfasts, student recognition banquets, and community newsletters. In addition, the Council planned workshops for the Williamstown conference, discussed the division's budget and reviewed MTA TODAY.

In its demand, the MTA did not designate any aspect of program 2.2 as chargeable. I find no notice to the Charging Parties, prior to the MTA's post-hearing brief,

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[68] Derived from the following formula: 519 chargeable hours x $58.26 value per hour + $223 chargeable portion of direct costs.

that charges were contemplated for the subprogram. Because of the prejudice to the Charging Parties, I will not permit any program 2.2 charges to be assessed now.

Total costs of 2.2: $5,927
CHARGEABLE COSTS OF 2.2: $ 0

Program 2.3: Division Management/Speeches/Special Events.

The division's administration is allocated to this subprogram. Specific program 2.3 activities include writing speeches and position papers, reading job-related publications, participating in special events, attending management meetings and committee meetings, and completing time and expense reports.

One communications employee worked on a Q-3 telephone bank and received $267.49, the costs of which were spread over the Communications subprograms. This cost item is deleted from the total chargeable costs of the division.

Total costs in programs 1.1-2.2: $620,145
Chargeable costs in programs 1.1-2.2: $ 33,529
Chargeable proportion of Communications costs: 5.4%
Total costs of 2.3: $164,458
Chargeable costs 2.3: $ 8,881

CHARGEABLE COSTS OF THE COMMUNICATIONS DIVISION

Total costs: $784,603
Chargeable costs: $ 42,410

IX. PROFESSIONAL DEVELOPMENT DIVISION

Overview

The Division of Professional Development provides services related to educational issues and policies and

their implications in the daily professional lives of teachers. Frederick Andelman is the division's director and the division employs two other professional staff, Timothy Fitzgerald and Nora Todd, as well as two support personnel.

The services of the division are found in five general areas providing information, consultation and programs to improve local conditions for teaching and learning; assisting members in continuing professional education; enabling members to achieve control over the development and management of their professional careers; advocating, monitoring and influencing educational policies that both solve problems affecting teaching and promote educational excellence; and supporting MTA Committees and other MTA program areas. Professional Development planned and implemented a series of conferences and workshops; dispensed Professional Development Grants; coordinated meetings and seminars with local associations; and analyzed legislation and public policy initiatives affecting teaching conditions in the Commonwealth.

Activities related to improving the working conditions or improving the professional competence of members of a bargaining unit are chargeable to fee payers. As the Antry court noted, "Such activities have the effects, among others, of making the teacher's job easier, facilitating better rapport between teachers and the parents of their students, and making students more amendable to instruction." Antry, 552 N.E.2d at 348. See also, Gunsolley and Rock Island Education Association, 8 PERI 15,45 (IELRB, ALJ, 1992), aff'd PERI 1050 (IELRB 1992); Kantrovich and Maine Teachers Association, 10 PERI 1022 (IELRB, ALJ, 1993); Christensen and Round Lake Education Association, 6 PERI 1084 (IELRB 1990). Indeed, the

Charging Parties concur that professional development expenses that are limited to helping teachers improve their professional skills are chargeable. (Charging Parties' Brief, Vol. III, p. 79).

Program 1.0: Local Conditions for Teaching and Learning.

Program 1.1: Programs to address professional needs.

Professional Development's assistance to local associations concerning day-to-day teaching issues are allocated to program 1.1. Activities charged to program 1.1 included providing workshops, films, talks, or programs of in-service education or staff development to local associations on topics such as documenting long-standing problems with a principal, stress management and teacher certification.[69] Program 1.1 also involves providing advice and support on the educational aspect of collective bargaining issues like analyzing the educational impact of a school district reorganization proposal.

Andelman conducted a workshop on stress management for both the Marblehead Teachers Association and the Northborough Education Association during 1990-91. The division performed a "Staff Satisfaction" survey for the Rockport Teachers Association concerning the principal's performance.

The Charging Parties contend that program 1.1 is not chargeable because aspects of the subprogram's activities, including a survey with questions about the educational needs of gay and lesbian youth, contained ideological assumptions or were to be used, in the case of a special

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[69] I credit Andelman's testimony that conferences and workshops are not limited to MTA members and that membership information is not checked when pre-registering for a conference.

education survey, in attempts to influence public educational policy. I am persuaded, however, that the examples cited by the Charging Parties actually reflect chargeable activity. The challenged needs assessment survey is an internal communication asking, among other items, whether polled educators would be interested in a workshop on meeting the needs of lesbian and gay youth. This internal inquiry simply samples educators' in-service needs and does not significantly further burden nonmembers' free speech interests. Moreover, the special education survey, summarized in the December 1990 MTA SPECIAL EDition, concerned special education working conditions. Although the survey was used in conjunction with the special education regulatory review process; gathering and internally disseminating the working condition data, and the professional opinions of special educators, is chargeable. Additionally, Todd's later special education legislative testimony was not allocated to program 1.1. Therefore, program 1.1, in its entirety, is chargeable.

General costs in 1.1:	$14,884
TOTAL CHARGEABLE COSTS IN 1.1:	$14,884

Program 1.2: Network of locals to study school improvement/restructuring.

This subprogram was not funded during 1990-91.

Program 1.3: Professional Development Grants.

The MTA provided professional development grants to local associations, groups of members or individual members to support programs that improve local teaching or learning conditions or assist educators in professional development or in achieving a greater role in the management of their professional lives. A total of 26 grants, of either $400 or $500, were awarded to various local

associations in 1990-91. The costs of the grants are reflected in the direct costs of program 1.3.

I reject the Charging Parties' contention that the grants are a members-only benefit. While MTA members or local associations may initiate the grants, there is no indication that funded programs or initiatives are restricted only to MTA members. The record evidence demonstrates that the grant program is intended to directly improve bargaining unit members' professional competence and work lives. Therefore, the general and direct costs are chargeable.

General costs in 1.3:	$ 2,919
Direct costs in 1.3:	$11,288
TOTAL CHARGEABLE COSTS IN 1.3:	$14,207

Program 2.0: Continuing Professional Education.

Program 2.1: Single-issue workshops and seminars.

The division ran after-school educational workshops and allocated the activity to program 2.1. The so-called "Wednesday Workshops" tended to be small and devoted to a single issue. The division, for example, conducted workshops on whole language, a method of teaching language and literacy skills at the elementary school level. The Charging Parties argue that whole language instruction is not chargeable, because it is "at the heart of a public policy dispute over how to teach children to read." (Charging Parties' Brief, Vol. III, p. 83). I do not perceive whole language educational instruction to involve or promote a philosophy or idealogy that would further burden nonmembers' speech and associational rights. Contrary to the Charging Parties' assertions, I do not find that the workshops were restricted to MTA members only, nor do I agree that the MTA's asserted lack of publicity to nonmembers renders the workshops nonchargeable.

The Professional Development Division's program 2.1 activity included offering a Fall Substance Abuse Program through Fitchburg State College. Graduate credit was available for the course, which explored the role of the classroom teacher in working with youth and adults affected by chemical dependency. The division sponsored approximately 15 such courses during 1990-91. Tuition for both members and nonmembers was $210, with nonmembers assessed a $50 surcharge.

The Fall Substance Abuse course is designed to improve the professional competence of educators and, except for the nonmembers' surcharge, would constitute chargeable activity. However, the MTA seeks to charge the nonmembers their pro rata share of the underlying costs of producing and sponsoring the course. Nonmembers who chose to attend the course, however, have already been assessed an additional charge, apparently to help subsidize or underwrite the course's cost, and should not be charged twice for the same cost items. Therefore, the previously assessed surcharge renders the substance abuse course nonchargeable.

I have reviewed the division's time records and have isolated the activity report entries for chargeable program 2.1 Wednesday Workshop activity. Andelman recorded 12 hours to the workshops, Todd charged 59.5 hours, while Fitzgerald noted 5 hours of Wednesday Workshop activity, for a total of 76.5 chargeable hours. However, I have been unable to identify or segregate chargeable direct expenses from those arguably incurred in connection with the substance abuse course. Moreover, since direct expenses comprise the bulk of the program area's costs and include numerous college and hotel charges that appear to relate only to the course, I am not persuaded that permitting a proportional charge for the direct

expenses here, as I did with direct expenses in Communications program 1.6, would be reasonable. Therefore, all direct expenses are nonchargeable.

General costs in 2.1:	$ 7,513
Chargeable general costs in 2.1:	$ 5,777
Direct costs in 2.1:	$28,176
Chargeable direct costs in 2.1:	$ 0
TOTAL CHARGEABLE COSTS IN 2.1:	$ 5,777

Program 2.2: Conferences and professional forums.

The only state-wide conference charged to program 2.2 during 1990-91 was the April 1991 Better Ideas Conference.[70] The conference consisted of 32 sessions on subjects ranging from aviation education to women's literature, and a keynote speech by Robert Coles, Harvard psychiatrist, teacher and researcher. Two hundred educators attended the conference. The conference, geared toward educators' professional competence, is chargeable.

General costs in 2.2:	$17,178
Chargeable general costs in 2.2:	$17,178

The direct costs in 2.2 include a payment to Bentley College, the conference site; payments to the keynote speaker and other conference presenters, and other miscellaneous conference expenses. All direct conference expenses are chargeable.

Direct costs in 2.2:	$12,034
Chargeable direct costs in 2.2:	$12,034

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[70] The Charging Parties assert that activity concerning the Human and Civil Rights Conference was allocated to this program area. However, after an extensive review of time sheets and of total hours allocated to each subprogram area, as detailed in Anzivino's affidavit, I am persuaded that costs and activities concerning the conference were charged to program 5.2.

TOTAL CHARGEABLE COSTS IN 2.2: $29,212

Program 2.3: Project TEACH.

Project T.E.A.C.H. is an acronym for Teaching Effectiveness and Classroom Handling. During 1990-91, Andelman and Fitzgerald worked on the project, a 45-hour graduate credit course, offered through Fitchburg State College. The course examined teaching techniques and skills and, thus, concerns educators' professional competence. Tuition was charged of all attendees, and nonmembers were required to pay a $50 surcharge. As previously discussed, the nonmember surcharge renders the entire program nonchargeable. The program is directly geared to refining educators' mastery of classroom skills and, if not for the surcharge, would be fully chargeable.

General costs in 2.3: $20,878

Direct costs in 2.3: $49,574

Expenditures to Fitchburg State College, the course instructors and material suppliers are included in the project's direct costs.

TOTAL CHARGEABLE COSTS IN 2.3: $ 0

Program 3.0: Career Enhancement Resources.

Program 3.1: Career awareness programs for beginning teachers.

This program was not implemented or funded.

Program 3.2: Regional meetings for senior career teachers.

In conjunction with the Massachusetts Department of Employment and Training, the division sponsored five regional workshops to provide information to teachers facing lay-off. The workshops, and their attendant costs, deal directly with job security and conditions of employment and are chargeable. Moreover, I credit Andelman's general testimony that workshops were open to all.

General costs in 3.2:	$ 72
Direct costs in 3.2:	$298
TOTAL CHARGEABLE COSTS IN 3.2:	$370

Program 4.0: Monitoring/Influencing Educational Policy.

Program 4.1: Monitoring Board of Education and Board of Regents meetings.

A member of the division attends every meeting of the State Board of Education and frequently attends Board of Regents of Higher Education gatherings. The state Board of Education is responsible for the following subjects: curriculum and instruction, administration and personnel, research and development, school facilities and related services, state and federal assistance, occupational education, special education, and educational personnel. Pursuant to G.L. c.5, Section 1F, the Board's responsibilities include certification and preparation of educational personnel and supervision of the administration of vocational and special education. Under G.L. c.15, Section 30A, the Board of Regents of Higher Education, among other responsibilities, established "standards relative to faculty equipment, courses of study, financial organization, facilities, physical plant and leadership which shall apply to any educational institution for which said board has approved the certificate of organization..."

Fitzgerald monitored the Boards of Education and Regents during 1990-91, to identify and track emerging educational policies, trends and issues that may affect educators.[71] Fitzgerald summarized the meetings and

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[71] Contrary to Charging Party Conner's assertions, the record demonstrates tangible connections between the Professional Development Division and the MTA's higher education constituents. See also, Program 6.4, infra.

reported to President Bacon, Executive Director-Treasurer Sullivan and Andelman concerning issues that may require further monitoring or attention. Andelman and Fitzgerald spent 85.5 hours on activities related to monitoring the Board of Education, the value of which is $6,038.

The Boards of Education and Regents retain broad statutory authority concerning matters affecting educators' terms and conditions of employment. The evidence indicates that division personnel merely observed and collected information at routine Board meetings. The record does not suggest that Fitzgerald or Andelman affirmatively engaging in lobbying or other advocacy activity. It is clearly in the bargaining agents', or its affiliates', interest to monitor educational trends and other issues that may impact upon unit members' conditions of employment. Moreover, an informed union membership and leadership are best equipped to negotiate collective bargaining agreements and protect bargaining unit members' interests.

The Board of Education created the Massachusetts Advisory Commission of Educational Personnel (MACEP), to advise the Board on matters relating to teacher preparation and certification. Division of Professional Development personnel, primarily Nora Todd, monitored the Commission to both keep abreast of its developments and to provide assistance to the MTA members of the body. The MTA was awarded seats on the Commission due to its role as a bargaining representative for educational personnel. Therefore, I will permit charges for this activity on two grounds: first, monitoring teacher preparation and certification standards affects bargaining unit employees' terms and conditions of employment, thereby implicating the MTA's representational responsibilities; and, second,

professional development personnel serve as support staff to MTA personnel performing an adjunct to its exclusive representation role.

During 1990-91, the Joint Task Force on Teacher Preparation was created by the Chancellor of Higher Education and Commissioner of Education to determine how teachers are prepared and licensed. The Task Force issued a report containing several recommendations for new certification guidelines, including eliminating the undergraduate education major and requiring a mentor teacher component for certification. At the time, certification was governed by G.L. c.71, Section 38G, providing permanent certification for anyone meeting the requirements set forth therein. The Task Force proposal, if implemented, would have significantly changed the certification requirements, thereby affecting the initial hiring and continued employment of teachers, and the hiring, training and compensation of mentors. Professional Development monitored the Task Force to gain insight into, among other things, the training and compensation of mentors who, presumably, would be veteran bargaining unit employees, and the possibility of new responsibilities for higher education employees. In addition, the division promulgated a summary of the Task Force's activity. I am persuaded that there is a sufficient nexus between the Joint Task Force on Teacher Preparation and the MTA's representational role to permit charges for the Task Force's oversight.

During 1991, the legislature conducted a five year review of the regulations governing special education within the Commonwealth. Nora Todd was responsible for monitoring special education developments and reviewing the regulations. In response to a MTA Conditions of Special Education Survey conducted in the spring

of 1990, special educators voiced a variety of working condition concerns. Todd analyzed the special education regulations in light of the survey results and testified before the legislature concerning the proposed regulatory changes. Although Todd charged her testimony to program 6.7, her special education analysis and at least some testimony preparation appear to have been allocated to program 4.1.

Here, Todd performs an active advocacy role in the legislative forum, rather than the information gathering and monitoring roles previously described under this program area. Instead of simply preparing internal information pieces, Todd communicates to the legislature, and thereby the public at large, concerning special education issues, and, as the content of her testimony indicates, the funding of education in general. Her speech, in a public and legislative forum, additionally burdens nonmembers' rights. Therefore, I delete Todd's 58 hours of special education time, at a value of $4.095, from the program 4.1 chargeable total.

Finally, the division hosted a reception for the Lucretia Crocker fellows -- educators who had received full year, state funded sabbaticals. The reception, honoring achievement in education, is chargeable.

General costs in 4.1:	$26,271
Chargeable general costs in 4.1:	$22,176

The direct costs in program 4.1 include expenditures for the reception, reimbursements for MACEP group functions and individuals' expenses concerning work with the Board and Department of Education. All direct expenses are chargeable.

Direct costs in 4.1:	$ 7,034
Chargeable direct costs in 4.1:	$ 7,034
TOTAL CHARGEABLE COSTS in 4.1:	$29,210

Program 4.2: Cooperate with other agencies and organizations concerned with education.

The division participated in a variety of programs relating to education during 1990-91, including the University of Massachusetts Mentor Teachers Conference in conjunction with the UMass School of Education, the Beginning Teacher Project, the Massachusetts Education Conference Board, and a project with Continental Cablevision regarding cable in the classroom. The Beginning Teacher Program was developed in concert with the Field Center for Teaching and Learning at UMass. The Massachusetts Education Conference Board is an organized, neutral information sharing forum for organizations within the education community. "Cable in the Classroom" is a publication as well as a curriculum program fostering the use of cable television as an instructional tool. All these activities, aimed at improving teachers' professional competence, are chargeable.

Included within the 4.2 program area is the division's involvement with A World of Difference, a multi-cultural education organization. The division co-sponsored a conference with the organization, in conjunction with Shawmut Bank and the Department of Education, on the issue of diversity in education. Due to the arguably ideological content of the conference, the MTA has elected not to charge nonmembers for the 25 hours of A World of Difference activity, valued at $1,766. I delete an additional 9.5 hours, at $671, for Todd's special education legislative activity charged to this program area, and Fitzgerald's voter registration meeting.

General costs in 4.2:	$14,724
TOTAL CHARGEABLE COSTS IN 4.2:	$12,287

Program 4.3: Gather and disseminate information on current educational issues and emerging trends.

The Professional Development Division generated internal discussion papers to familiarize staff and leaders with all aspects of current educational policies and ongoing debates, including the MTA's position on the issues. The Professional Development Council, with input from President Bacon and Executive Director-Treasurer Sullivan, selected the issue topics from current major educational issues. Topics addressed included: recertification, the extended school year, merit pay, career ladders, school district receivership, school choice, teacher testing, vouchers and site-based decision making.

The issue papers were not prepared as lobbying pieces and were not distributed to legislators. Rather, they were distributed to staff and local association leaders in a packet entitled "Issues in Education." Each subject included a description of the issue, its points and counterpoints, and comments. In addition, each issue heading bears the notation "Approved for internal use by MTA Board of Directors -- Not for Distribution." I credit Strecker and Andelman's consistent testimony that the issue papers promoted a thorough understanding of the working lives of teachers and enhanced effective collective bargaining skills.

The division also analyzed legislative proposals. Drafts of various education reform initiatives, including Governor Weld's numerous restructuring proposals, were examined. As previously discussed in Affiliate Services and Legal Services, earlier higher education restructuring had significant impacts upon bargaining unit employees' working conditions. Therefore, an internal examination, analysis and discussion of current restructuring proposals is a requisite component of the MTA's collective bargain-

ing role and, as an internal union function, does not additionally impact nonmembers' First Amendment Rights.

The Massachusetts Business Alliance for Education produced a widely distributed study called "Every Child a Winner." The Alliance was an independent business group, whose primary purpose was to influence education reform policy. Aspects of the reform proposal included certification requirements, job security, tenure and seniority; matters affecting working conditions with collective bargaining implications. Professional Development analyzed the proposal and Andelman made an education reform presentation at the Affiliate-Services retreat.

The internal analysis and discussion of the educational and working condition impacts and consequences of education reform proposals is chargeable, as is the preparation and internal distribution of the Issues Papers. All activity within this program area involved the collection and distribution of information that increased the bargaining agents' knowledge and expertise concerning educators' terms and conditions of employment and the surrounding educational milieu. Accordingly, these activities are fully chargeable.

General costs in 4.3:	$44,245
TOTAL CHARGEABLE COSTS IN 4.3:	$44,245

Program 5.0: MTA Committees.

The MTA transferred from one committee structure to another during 1990-1991, a transition that resulted in some confusion concerning the allocation of the division's committee time. At the beginning of the year, the division provided staff consultation to the following committees: Special Education, Occupational and Vocational Education, Instruction and Professional Development, and

Human Relations Committees. After the restructuring, division staff were assigned to support the Professional Development Council and the Human Relations Council.

The Human Relations Council is the result of the consolidation of several other councils and committees, including the Human and Civil Rights Council and the Peace and International Relations group. The Council was responsible for the Annual Human and Civil Rights Conference, as well as for communicating MTA's moral support for other educational personnel unions in other nations. Topics of discussion at its meetings were the US role in the Persian Gulf War, the Massachusetts Association of Bilingual Education Conference, the Summer Leadership Workshop on global and multicultural education and human relations and possible MTA endorsement of the Gay Pride March. A review of the division's time sheets indicates that activity concerning the Human Relations Council, and its Human and Civil Rights Conference, was allocated to program 5.2.

Program 5.1: Professional Development Council.

Professional Development Council activity was originally charged to 5.1, and although it should have been charged to 5.0 after the reorganization of councils and committee, 5.1 charges persisted. The Council's charges covered most aspects of the division's activities, including the Wednesday Workshops, the Better Ideas Conference, the SPECIAL EDition publication, internal publications, professional publications, Conditions in Teaching Special Education Survey, Networking, legislative policy--including certification issues, Networking, Williamstown Conference and division programs like Project TEACH. Although defeating Q-3 is enumerated as one of the council's specific annual charges, I find no indication that the council was involved in the campaign.

The activities of the Professional Development Council are reflective of the activities undertaken by the division as a whole. Therefore, council activities are chargeable in proportion to the division's overall chargeable activity.

General costs in 5.0 and 5.1: $18,584

Chargeable costs in 5.0 and 5.1: To be determined

Program 5.2: Annual Human and Civil Rights Conferences.

Activity and expenses in connection with the Human and Civil Rights conference, including the annual awards, were allocated to program 5.2. Planning the annual conference and selecting the award recipients is a central function of the Human Relations Council. Due to the arguably ideological content of both the Council and its conference, the MTA has elected not the charge nonmembers for their costs.

General costs in 5.2:	$13,324
Direct costs in 5.2:	$ 5,824
TOTAL CHARGEABLE COSTS IN 5.2:	$ 0

Programs 5.3, 5.4, 5.5.

There were no general costs allocated to program 5.3, 5.4 or 5.5 during the year at issue. Likewise, there were no direct costs to 5.4 or 5.5.

The direct costs for an administrators' conference, sponsored by the division, were allocated to 5.3. The expenses included payments to individuals and, presumably, the conference site. I am willing to infer, based on the nature and amount of expenses and the similarity of the itemized expenditures to costs within other chargeable conference programs, that the expenditures included speakers' costs and payment for the conference site and vendors. Therefore, the expenses are chargeable.

Direct costs in 5.3:	$1,317
TOTAL CHARGEABLE COSTS IN 5.3:	$1,317

Program 5.6: Special Education Committee.

Activity in relation to the Special Education Committee was generally allocated to 5.6. As previously discussed, the Committee conducted a survey concerning the working conditions of special educators and worked with the division on the production of the SPECIAL EDition publication. The newsletter was published periodically and distributed to special educators. The newsletter contained a legislative update, detailing the complex federal and state regulations that governed the special education field. One issue concerned the results of the Special Education Survey, while another previewed the Special Education Track at the Williamstown conference.

The Special Education Committee, its survey and its publication are vehicles designed to communicate with a discrete population within the bargaining units represented by the MTA, to evaluate their working conditions and communicate survey results. The program area is fully chargeable.

General costs in 5.6:	$4,741
TOTAL CHARGEABLE COSTS IN 5.6:	$4,741

Program 6.0: General Program Assistance and Administration.

Program 6.1: Implement/provide administrative support for ten TASCs.

TASC is an acronym for Teachers Association Study Conference. There are 10 TASCs, roughly organized by geographic region, that generally meet 6-8 times per year. The Professional Development Division has logistical support responsibilities for the TASCs. Therefore, the division provides clerical support to coordinate and set the TASC schedules, maintain TASC mailing lists, send out meeting notices, and compile responses. Each spring a division secretary will communicate with each TASC and

try to develop the upcoming year's TASC calendar. The frequency of meetings vary between TASCs and ranges from monthly to about half a dozen times a year. Likewise, attendance varies, from 10 to 60 individuals. The meeting agendas are set by the TASC chair, and Professional Development personnel simply distribute the agendas. Meetings typically occur in restaurants and the division handles meal orders.

The subjects of TASC meetings included health insurance developments, strategies for collective bargaining, the Summer Leadership Conference, grievance workshops, the legal implications of teachers dispensing medicine to students, membership recruitment, site-based management and an extension of the school year. "Local concerns" is a routine TASC topic, where each local association reports on its issues. In addition, there are usually guest speakers, the regional manager's report, question-and-answer periods and socializing opportunities. The MTA's political efforts were also discussed, included Question-3 and the Penny on the Sales Tax campaign.

The costs associated with the TASCs in the Professional Development budget are largely administrative and clerical in nature. The meetings provide a forum for the formal and informal exchange of collective bargaining and representational ideas, issues and concerns. I consider the political content of the TASCs to be incidental to their overall function and to the minimal costs associated with the advance scheduling of the meetings, producing or distributing the agendas and arranging meeting logistics. Therefore, the general and direct TASC costs within the division's budget are chargeable.

General costs in 6.1:	$ 658
Direct costs in 6.1:	$ 621

TOTAL CHARGEABLE COSTS IN 6.1: $1,279

Program 6.2: Support for Summer Leadership Conference.

The Professional Development Division was responsible for the Special Education Track, including the Occupational Education/Vocational Education mini-track, and the Instructional and Professional Development (IPD) track at the conference. The Special Education Track was designed for educators' either involved in, or interested in, special education and related issues. The opening track session dealt with understanding the interplay between public education and other human services. Other sessions included: Neuropsychology for Educators; Medication/Medical Care; The Conditions of Special Education Survey Findings; Setting the Agenda for Change: a strategy session; Elementary Programs that Work: the integrated classroom model; and Middle and Secondary Programs that Work: the instructional cooperative teacher model. Time spent by the division's personnel at the conference was allocated to program 6.2.

The previous spring, the division requested proposals for the upcoming IPD track, whose focus was to identify and trace new issues facing educators and education and how to cope with personal and professional challenges. "Humor in Education" was the opening IPD track session, designed to show how humor could be utilized as an educational resource. Other sessions included: The Changing International Scene and Implications for Educators and Education; AIDS Prevention Education: Policy Resources and Training--which reviewed the Massachusetts AIDS/HIV and school attendance policy; Autobiographical Writing for All Students: An Old Idea with a New Approach; and, The Information Age: Hypermedia and Desktop Publishing.

Both the Special Education track and the IPD Track at the Summer Leadership Conference are fully chargeable. The programs were designed to enhance and augment the professional competence of bargaining unit members.

The division's professional staff, however, also engaged in nonchargeable political activities in connection with "Beat CLT Day." Andelman, Todd and Fitzgerald spent a total of 38.5 hours, at a value of $2,668 dollars as CLT Trainers.[72] I delete the value of this nonchargeable activity from the remaining chargeable costs.

General costs in 6.2: $37,906

TOTAL CHARGEABLE COSTS IN 6.2: $35,238[73]

Program 6.3: Support for MTA Local Presidents' Meetings.

Professional Development provided support for statewide meetings for local presidents. A January 30, 1991 conference, held in conjunction with the Massachusetts School Superintendents Statewide Conference, had "Decisions in Public Education for a Decade and Beyond" as its central theme. Individual session topics included school funding, parental involvement, extensions of the school day and year, site-based decision making and vouchers/parental choice. Speaking invitations were extended to Governor Weld and Lt. Governor Cellucci, who both declined. Legislator Mark Roosevelt, an archi-

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[72] Andelman charged 18 hours to 6.2 for nonchargeable activity on 8/9, 8/13 (1 hour), and 8/14. Todd and Fitzgerald allocated their 8/9 Marlborough attendance to program 6.7. Therefore, their time on 8/13 and 8/14 totaled 11.5 and 9 hours, respectively.

[73] The $7,275 direct costs identified in Anzivino's affidavit under program 6.2 actually relate to the Presidents' Conference and, therefore, are addressed under program code 6.3.

tect of education reform, was the luncheon speaker. The conference topics and agenda reflect a mix of collective bargaining issues and of educational policy and revenue equity matters. I am persuaded that informational aspects of the conference, and the corresponding informal, constructive contact between union leaders and management representatives, were beneficial to collective bargaining relationships. However, other aspects of the conference were opportunities to air and express nonchargeable, ideological concerns and build coalitions concerning educational policy and education reform issues. Therefore, in recognition of the conference's dual purpose and mixed content, its general and direct costs will be ½ chargeable.

General costs in 6.3:	$3,742
Chargeable general costs in 6.3:	$1,871
Direct costs in 6.3:	$7,275

The direct costs include an expenditure to Buon Giorno for the conference site costs and a catering bill.

Chargeable direct costs in 6.3:	$3,638
TOTAL CHARGEABLE COSTS IN 6.3:	$5,509

Programs 6.4, 6.5 and 6.6: Provide support for MTA's higher education, educational support personnel and administrator constituencies.

The division provided financial and staff support to the divisions of higher education, education support personnel and the administrator constituencies in funding and implementing professional development programs, with 6.4 representing assistance to higher education, 6.5 to the support personnel units and 6.6 to administrators' groups. However, little activity occurred with the support personnel. These expenditures represent chargeable, educational activities for represented employees.

General costs in 6.4, 6.5, 6.6:	$ 900

TOTAL CHARGEABLE COSTS
IN 6.4, 6.5, 6.6: $ 900

Program 6.7: General assistance as assigned or requested.

Activity performed at an individual's or another division's request, that does not comfortably fit under the description of any other program area, is assigned this catch-all designation. For example, requests from Affiliate Services for assistance with a staff conference may be charged here, as would time spent reviewing and responding to a letter at the direction of the Executive Director-Treasurer. Additionally, Todd and Fitzgerald may charge an activity assigned by Andelman to 6.7.

The division's assistance in the Question-3 campaign was charged to program 6.7. Some of Todd and Fitzgerald's budget debate time is allocated to 6.7, as is activity related to the Penny campaign. Todd's legislative testimony concerning proposed changes in special education is allocated here. In addition, staff time spent in conjunction with elections and reviewing the positions of candidates for public elective office is charged to 6.7.

In its brief, the MTA isolates certain staff activity that is asserted to be chargeable. I concur that 50.5 hours of Fitzgerald's time spent in connection with the Higher Education Leadership Council and 39 hours with the Higher Education Conference is chargeable.[74] In addition,

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[74] In previously considering higher education conference costs in Affiliate Services, I discounted the direct costs of a February higher education conference due to the overall mixed chargeable/non-chargeable meeting content. However, I permitted all staff time charges, thereby roughly equalizing the chargeable/nonchargeable costs, and rendering the meeting ½ chargeable. Therefore, Fitzgerald's time here is a portion of the chargeable conference costs.

I consider various time allocated to staff meetings, special education meetings, vocational education conferences, the Massasoit Faculty Association, the Fitchburg Association, school administrators' conference, the USA local and conference committee reports to be chargeable, at a total of 84 hours. Andelman's 12 hours in connection with his education reform presentation at the Affiliate Services retreat are chargeable, as are Todd's 13.5 hours of attendance at the MTA Annual Meeting and 8.5 hours for preparing MTA TODAY articles and planning conferences.[75] Total chargeable 6.7 time is 207.5 hours, at a value of $14,380. There are no chargeable direct costs allocated to program 6.7.

General costs in 6.7:	$51,108
TOTAL CHARGEABLE COSTS IN 6.7:	$14,380

Program 6.8: Liaison to NEA Divisions.

The division served as a liaison to the NEA's Division of Instruction and Professional Development (IPD), the NEA's program on Human and Civil Rights, the National Staff Association for the Improvement of Instruction and other national and regional NEA programs. Also allocated to program 6.8 were participation in NEA programs such as the NEA-MTA Womens' Leadership Training Program, the NEA Standards Board Conference (dealing with teacher certification and professional standards boards), the Team Approach to Better Schools and, the Northeast IPD conference. Todd also attended a NEA-funded Group

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[75] I have reduced Todd's time allocated to these activities by ½, to reflect the overall chargeability the articles and to reflect the conferences' content, including the joint conference between local presidents and superintendents. In addition, I do not consider testimony concerning special education regulations to be chargeable.

Processing Skills training program, in connection with the Women's Leadership Program.

The division developed an initial plan for the MTA to develop at least one model school in the state, in conjunction with the NEA Learning Laboratory. NEA materials were reviewed, a prospectus prepared and proposals were sought from local associations, with all activity charged to 6.8.

Under program 6.8, Fitzgerald attended a NEA NALPSE Conference in Florida, dealing with national educational trends. Time spent on "NEA Gay and Lesbian Training" was also charged to 6.8.

The MTA now seeks to charge nonmembers only for the costs associated with the NEA IPD activities and the costs of attending the Standards Board and NALPSE conferences. Todd, Andelman and Fitzgerald recorded a total of 46 staff hours to the NEA IPD and Northeast IPD conference activities, at a value of $3,187. Andelman allocated 25 hours to the NEA Standards Board Conference, valued at $1,732. Finally, Fitzgerald's conference attendance totaled 33 hours, at $2,286. The detailed activity is chargeable because it relates to working condition issues of licensure and certification and provides background information relating to educators' professional competence. The MTA does not seek any of the $8,155 in direct costs allocated to program 6.8.

General costs in 6.8:	$20,339
TOTAL CHARGEABLE COSTS IN 6.8:	$ 7,205

Program 7.0: Division Management.

Division management activities are charged to program 7.0, including program design, budget matters and meeting attendance. A major component of Andelman's program 7.0 time is spent responding to miscella-

neous inquiries and information requests as the MTA's internal mailbox and telephone drop of last resort.

The administrative costs in program 7.0 are chargeable in proportion to the division's chargeable activity as a whole. In addition, various allocations of time, valued at $4,323, were erroneously charged to nonexistent subprogram codes or to major program codes, without a subprogram designation. It is reasonable to allocate these slight time charges according to the division's overall chargeable percentage.

TOTAL CHARGEABLE COSTS IN 1.1, 1.2, 1.3; 2.1, 2.2, 2.3; 3.1, 3.2, 3.2; 4.1, 4.2, 4.3; 5.2, 5.3, 5.6; 6.1, 6.2, 6.3, 6.4, 6.5, 6.6, 6.7, and 6.8:	$206,381
Total costs in programs 1.0-6.8:	$423,427
Less programs 5.0 and 5.1: ($18,584)	$404,843
Less assorted general costs: ($4,323)	$400,520
CHARGEABLE PERCENTAGE:	51.5%
General costs in 7.0:	$ 84,060
CHARGEABLE COSTS IN 7.0:	$ 43,291
CHARGEABLE COSTS IN 5.0 AND 5.1:	$ 9,571
CHARGEABLE ASSORTED COSTS:	$ 2,226
CHARGEABLE COSTS OF THE PROFESSIONAL DEVELOPMENT DIVISION	
Total costs:	**$507,487**
Chargeable costs:	**$261,469**

X. DIVISION OF RESEARCH

Overview

The Division of Research collects, analyzes, organizes and distributes various types of data. A large aspect of the

division's work concerns the financial condition of local employers. Research periodically issues data summaries used in collective bargaining situations, including comparisons of fringe benefits, contract language, and salaries in different communities in Massachusetts. Additionally, the Research Division prepared bulletins showing the amount of "free cash," the money that was not spent in previous fiscal years, in each community. Division designed and promulgated surveys collected information about bargaining unit employees' job satisfaction and about working conditions within the special education field.

For over half of 1990-1991, the division was staffed by Director Felix Zollo, a division coordinator and a research clerk. On February 19, 1991, David Danning joined the staff as assistant director. To the extent that the division was involved in any of the MTA's political campaigns, the activity was Danning's responsibility. Except for his election day presence at the polls, Zollo had no involvement in Q-3, in Reveille, or in the Penny campaign. Danning, on the other hand, did some work on the Penny campaign, reviewed legislation for the Governmental Services Division and sometimes met with Executive Director-Treasurer Sullivan or Governmental Services Director Arline Isaacson concerning his results.

The Research Division's basic activities are contained in three broad program areas: 1.0, Contract Analysis and Collective Bargaining, Legislative, and Division Support; 2.0, Surveys and Affiliate Support; and 3.0, Research, Training and Training Programs. Research allocated its activities to program and subprogram areas based on the nature of its research and its intended use. For example, gathering municipal finance information would be allocated to 1.1, but its distribution would be charged to 1.4. The time spent developing a survey may be charged

to program 2.1, but disseminating the results may be allocated to 1.4.

Program 1.0: Contract Analysis and Collective Bargaining, Legislative, Division Support.

Program 1.1: State and municipal financial data.

Annually, the division compiles certain information. The division collects and publishes negotiated salary schedules from both MTA and MFT affiliated locals. Research also collates municipal finance data, from profiles provided by the Department of Revenue (DOR). The DOR annually creates profiles of each city and town in the Commonwealth, including the population, number of school children, tax rates, property valuations, budgetary information, and data relating to Proposition 2½. The profiles were transmitted to Zollo, in usable form. Research also produced reports estimating the unused tax and override capacities, and the free cash, of every city and town in the state. In collective bargaining, the reports illustrated the money available in a community to fund settlements. Finally, Research obtains the Department of Education's periodic Teacher Census. The Census contains teachers' salaries, educational backgrounds, certifications, class sizes and subjects. All of the activities in program 1.1 are germane to collective bargaining and are chargeable.

General costs in 1.1:	$6,593
Chargeable costs in 1.1:	$6,593

Program 1.2: Federal, state and municipal financial data in support of MTA legislative programs.

At the outset of 1990-91, the division did not engage in activity under program 1.2. After Danning's hire, he was responsible for the division's legislative support. Danning charged his review of legislation, and his work in the Penny on the Sales Tax campaign, to program 1.2. In

addition, Danning analyzed the cost implications of the Massachusetts Business Alliance for Education (MBAE) proposal, explained their potential impact to MTA staff and charged his time to program 1.2. The MTA argues that activity relating to the education reform proposal is chargeable and that 72 hours of Danning's time should be included in the fee. However, in its demand the MTA designated program 1.2, in its entirety, as nonchargeable. Although I concur that the activity related to the MBAE proposal is chargeable, due to the lack to notice to, and prejudice of, the Charging Parties, I will not permit the MTA to now assess the charge.

General costs in 1.2: $28,386
Chargeable costs in 1.2: $ 0

Program 1.3: Analyze collective bargaining agreements.

Research was developing a new computer system for storing and retrieving contract language, entitled CARS -- the Contract Analysis Retrieval System. CARS, when completed, should allow a local to locate desirable, existing contract language and negotiate over its inclusion in a future contract.

General costs in 1.3: $794
Chargeable costs in 1.3: $794

Program 1.4: Assistance to other MTA divisions.

Research's predominant activity is distributing the information collected under program 1.1 to appropriate recipients. Usually, requests for Research's services are made by field representatives engaged in collective bargaining activity. Typically, requests would involve information included in the Department of Revenue profiles or the Department of Education Census. Research routinely received requests for analyses of municipal budgets. In early 1991, the division released MTABAR, a

computer program for analyzing school and municipal budgets.

Research also answered questions concerning Proposition 2½. The Charging Parties assert that all Proposition 2½ issues are nonchargeable because they may relate to local override campaigns. (Charging Parties' Brief, Vol. III, p. 118-119). However, I credit Zollo's testimony that leaders would call to ask if a community had the money to fund certain proposals. Therefore, in order to assess a community's fiscal situation, local leaders and negotiators had to be familiar with provisions and the limitations of Proposition 2½. Additionally, Danning wrote a memorandum to regional managers explaining provisions of Proposition 2½ and charged his time to program 1.4. An awareness of economic realities, forecasts, and fiscal constraints are paramount collective bargaining considerations. Gathering and disseminating this economic information to local leaders and staff is certainly germane, if not critical, to collective bargaining and such internal union communication involves little additional infringement of nonmembers' rights. Therefore, the division's Proposition 2½ explications are chargeable.

Information provided to a fact finder or arbitrator may be charged to program 1.4. In the King Phillip school district, for example, Zollo testified before the School Committee that sufficient funds were available to avoid layoffs. Eventually, the layoffs were the subject of an arbitration.

While Research had the capability to do pay equity studies for educational support personnel, none were conducted during 1990-91. Zollo, however, attended NEA conferences on pay equity during the first two weeks of January and gave a presentation on a computer program he developed to analyze pay equity data. He

took MTA vacation time to attend, and an NEA grant paid for his expenses.

Although, in general, the activity allocated to program 1.4 is chargeable, the record reflects several isolated instances of misallocated, nonchargeable activity. Zollo charged .5 hours on December 20, 1990 to program 1.4 for time relating to the McDuffy litigation. The $55 value of this activity will be deleted from the program total. On March 12, 1991, Danning charged a hour meeting with Governmental Relations staff member Flannagan to program 1.4. Again, the value of the nonchargeable time, in this instance $110, will be deleted from the chargeable total.

General costs in 1.4:	$102,982
Chargeable costs in 1.4:	$102,817

Program 1.0: Direct Costs

Unlike other divisions, Research's direct costs were allocated to major programs, not subprograms and then proportionally spread among the subprograms. The three direct cost areas, totaling $14,591, were:

Journal of Education Finance:	$ 24
Software packages:	$ 1,067
Higher Education Databank:	$ 13,500

I find no record evidence indicating that any direct expense was exclusively incurred in connection with nonchargeable program 1.2 activity.

Total costs in 1.0:	$138,755
TOTAL CHARGEABLE COSTS IN 1.0:	$110,204

Program 2.0: Surveys and Affiliate Support.

Program 2.1: Surveys.

The division administers surveys designed to address issues of importance to the organization and its membership. Some surveys, like the Local Association Program (LAP)--measuring satisfaction with the local association's

performance and polling employees' preferences for collective bargaining gains or proposals--are provided by the NEA. In the fall and winter of 1990, Research conducted the LAP survey at the USA local at UMass Amherst. On March 14, 1991, Research presented the results to the USA Executive Board. As a result, several activities and workshops, designed to strengthen the local, took place in early April.

Research also designs surveys. Every May, for example, the division surveys local presidents about their satisfaction with MTA services. The presidents are polled about their satisfaction with their field representatives; with the various MTA divisions; with the retirement consultants; and with treasurers' assistance. The 1990-91 survey contained a section -- 10 questions out of 43 -- on that year's MTA political action. The responses are compiled and the data is transmitted to the MTA's governance.

I credit Zollo's testimony that the survey's construction is largely unchanged from year to year and that its compilation is essentially a clerical task undertaken by the division coordinator. The MTA's survey of its leadership is a measure of its primary consumers' satisfaction with the organization's overall services and resources. As such, the survey is generally germane to collective bargaining and, as a purely internal leadership communication, has limited additional impact upon nonmembers' rights. Therefore, despite the political inquires contained in the survey, it is fully chargeable.

Research has also designed and administered specialized surveys. During 1990-91, for instance, the division designed a telephone survey of the citizens of Hull to measure support for educational expenditures and attitudes towards increasing taxes. I credit Zollo's expla-

nation that the survey was designed to improve the local's prospects at the bargaining table, by serving as leverage to convince town officials to spend more on the schools. When the survey was first requested, it was considered a program 1.4 activity, but the time spent designing and implementing the survey instrument was allocated to program 2.1. As an adjunct to the collective bargaining process, the Hull survey is fully chargeable.

Zollo also developed the previously discussed Conditions of Special Education Survey. Most of Zollo's work took place in February or March 1990, but some final data was compiled during the summer of 1990. In addition, Zollo gave a special education survey presentation at Williamstown in August. Work on the survey was allocated to programs 1.4 and 4.1. The survey and Zollo's subsequent report concerned the working conditions of bargaining unit personnel. The Charging Parties argue that the survey is nonchargeable because of its association with the upcoming special education regulatory review process. (Charging Parties' Brief, Vol. III, p. 119-121). However, independent of the regulatory review, the special education survey provides valuable insight into, and a measurement of, special education working condition concerns; issues that may be addressed in collective bargaining. Therefore, the information gathering and reporting function is chargeable.

Research received survey support from the MTA's M.I.S. division. Specifically, M.I.S. input survey data and kept the computer programs in working order. M.I.S. also provided assistance for other Research Division program areas that required computer support. However, Research played no role in M.I.S.'s selecting or operating the survey scanner used in conjunction with the Question-3 campaign.

General costs in 2.1:	$8,500
Chargeable costs in 2.1:	$8,500

Program 2.2: Collecting local data as required by MTA and the Commonwealth.

Under this program number the division complied with Sections 13 and 14 of G.L. c. 150E, 456 CMR 16.05, by collecting and filing the Commission's Forms 1 and 2. The Research Division also annually compiled a directory of the names and addresses of all local Union officers; a roster used by all MTA divisions.

General costs in 2.2:	$4,598
Chargeable costs in 2.2:	$4,598

Program 2.0: Direct costs

Zollo received a NEA Pay Equity Project grant, which covered $11,627 of program 2.0 pay equity project direct costs, as reflected in the general ledger. While the grant was originally netted from the MTA #1 totals, they are chargeable expenses and are restored here. The grant was also used in conjunction with program 1.4 activity, attending a pay equity conference and a workshop presentation.

Total general costs in 2.0:	$13,098
Chargeable general costs in 2.0:	$13,098
Direct costs in 2.0:	$11,627
Chargeable direct costs in 2.0:	$11,627
TOTAL CHARGEABLE COSTS IN 2.0:	$14,725

Program 3.0: Training and training programs.

Program 3.1: Training in research techniques, statistical analysis, budget analysis.

Research analyzed municipal and school budgets by using MTABAR, and trained local association leaders to do the same. Local leaders would gather municipal financial information for the last five years, and the division's staff would input the data into the computer. As a result, a

complete picture of the municipality's expenditures would be developed. The model was a collective bargaining tool, permitting the MTA to track expenditures, determine who or what groups were receiving significant increases, and allowing comparisons to be drawn between the municipal and the school committee budgets. Danning performed budget analyses for, and presented his findings to, the Pathfinder and Haverhill locals. While the budget analyses and presentations may have contained references to, or information about, the provisions of Proposition 2½, the evidence does not reflect that the division "held workshops on Proposition 2½, overrides." (Charging Parties' Brief, Vol. III, p. 122). As previously stated, budget analyses are vital collective bargaining tools and are fully chargeable.

Finally, the division provided training to the field staff and local leaders on ASAP, a NEA salary analysis computer program. The program could compare the salaries under negotiation in a local with those in sample school districts; extend the comparison over the last three or four years; calculate salaries for two or three years with various kind of raises; and analyze an employer's total cost for any given raise. A workshop on budget analysis and ASAP was given at the Williamstown conference.

General costs in 3.1:	$8,424
Chargeable costs in 3.1:	$8,424

Program 4.1: Division Management.

Zollo's general administrative work, like correspondence, monitoring the division's budget, and supervisory duties, were allocated to program 4.1. In addition, attendance at staff meetings and the Williamstown conference were charged here. Although the division's management is chargeable in the same proportion as its overall activity, I will reduce the program by $685, the

value of Zollo's 6 hours at the polls on election day, an exclusively nonchargeable activity. Although Zollo was at Williamstown during "Beat CLT Day," the record does not reflect his participation in Question-3 campaign activities. Moreover, I decline to adjust the division's administrative charges due to the incidental political or other nonchargeable content of staff or management meetings.

Total costs in 4.1:	$ 80,177
Less $685:	$ 79,492
Costs in programs 1.0-3.3:	$171,904
Chargeable costs in programs 1.0-3.1:	$143,353
Chargeable proportion of Research costs:	83.4%
Chargeable costs of 4.1:	$ 66,296

CHARGEABLE COSTS OF THE RESEARCH DIVISION

Total costs:	**$252,081**
Chargeable costs:	**$209,649**

XI. DIVISION OF GOVERNANCE

Overview

The Governance Division administers the bylaws, policies, procedures, and activities of the MTA's governing bodies. It implements or oversees governance decisions and provides administrative and staff support to the governing bodies, the President, Vice-President, and Executive Director-Treasurer. Mary Ann Alfond serves as division director, and her staff includes a governance specialist, a conference administrator and two secretaries. In addition, Alfond has supervisory authority over the Division of Printing and Mailing.

As outlined in the primary Overview section, supra., the MTA's governance structure includes a president, a

vice-president, an executive committee and a board of directors. The MTA's local affiliates are divided into seven electoral regions and a statewide higher education region. An Electoral Review Committee redistricts the regions every four years. The regions are further subdivided into districts. There are 64 members of the Board of Directors (Board), who are educators or higher education faculty members, each elected from a district. Board members are elected at the Annual Meeting. The Board is the primary governing body of the MTA, controlling its policies and employing every MTA managerial or supervisory employee.

There are eight regional Executive Committee members, who are ex officio Board members, also elected at the Annual Meeting. The Executive Committee manages the real estate, personnel and financial matters of the MTA, including recommending an annual budget to the Board.

The President and Vice-President are also elected at the Annual Meeting. The President serves as chair of the Board, appoints the members of the MTA's many committees and councils, and recommends the appointments of chairs of the committees and councils to the Executive Committee and sets the agendas for the meetings of the Board and the Executive Committee. She also visits local associations and meets with members, to hear their concerns.

The Vice-President sits on the Executive Committee and on various committees and councils. He participates in Board meetings, attends statewide conferences and visits local associations.

The Executive Director-Treasurer, the MTA's CEO, is a non-voting member of the Board and Executive Committee and is employed by the Board. His position is consid-

ered part of the Division of Administration and Personnel, and his salary and expenses are allocated there.

The MTA's councils and committees are divided into four categories: committees of the bylaws; policy committees; program councils; and special project groups. The councils and committees report to the governance bodies and are a primary resource in formulating MTA policy.

In Ellis, the Supreme Court recognized that "[I]f a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy." Therefore, the Court deemed the union's governance convention to be fully chargeable. Ellis, 466 U.S. at 448. Echoing this rationale, the Commission, in Brown and Chicopee Firefighters, considered fund-raising for a local union's candidates for office with the national affiliate to be chargeable, because:

> [U]nion elections, like the conventions to elect officers "discussed in Ellis are necessary for a union to maintain its associational existence." In reaching this conclusion, we must balance the partisan political nature of the campaign against a union's need to elect officers to govern the organization. Because a union's ability to perform its role as bargaining representative depends on the perpetuation of the organizational structure, we conclude that the legitimate purpose of this expense outweighs any partisan aspects of it. Brown, 14 MLC 1241, 1255 (1987).

Under the paradigm outlined in Ellis, and echoed in Brown, internal governance functions--like the election of union officers--are necessary to the union's existence and are presumptively chargeable. As the Commission has indicated:

> [W]e will presume that overhead expenditures necessary to maintain an organization's existence are permissible, provided the union has produced some evidence that the expense was incurred in connection with the union's function as a collective bargaining agent.
>
> It would be difficult, if not impossible, to determine whether or to what extent such expenses are affected by the amount of impermissible activity undertaken by the union. Indeed, as the court recognized in Ellis, the union would presumably incur such expenses in essentially the same amount simply to operate at all... a charging party could rebut the presumption of permissibility only with evidence that the expenditure was actually incurred in furtherance of an exclusively impermissible activity. (emphasis added). Newton I, 13 MLC at 1596.

Pure governance functions, activities that are necessary to the union's existence, which would take place whether the union engaged in nonchargeable activities or not, are presumptively chargeable. When considering Governance costs here, the initial inquiry is whether the activity relates to sustaining, perpetuating or managing the Union as an entity. If so, the activity is presumed to be chargeable, unless evidence reveals expenditures related to exclusively nonchargeable activity. Then, when possible, such exclusively nonchargeable expenses will be isolated and deleted from the overall costs.[76] This view of

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[76] Contrary to the Charging Parties' position, I do not consider the MTA's asserted initial failure to segregate its nonchargeable Governance activity to preclude collecting any governance fee. (Charging Parties' Brief, Vol. III, p. 135).

governance expenditures appears to accord with that in other jurisdictions. See Dalan and East St. Louis Federation of Teachers, 8 PERI 1078 (1992) (Executive Board and governance committee expenses 100% chargeable); Gunsolley and Rock Island Education Association, 8 PERI 1028 (1992) (Vice-President, Board of Directors, Executive Committee, Elections Committee, Bylaws Committee, Review Board 100% chargeable, President 98.5% chargeable); Antry v. Illinois Education Labor Relations Board, 552 NE 2d. at 344 (Board and Executive Committee, 90% chargeable).

Other aspects of Governance are chargeable in proportion to the chargeability of the underlying activities. In Brown, the Commission identified the salaries of union officers as "administrative salaries," grouping them with the proportionally chargeable overhead expenses such as phone, postage and supplies. Brown, 14 MLC at 1251-52. Then, however, the Commission concluded that the union had not established any salary chargeability because "[t]here is no record evidence about the duties of the officers or how much time they spent on permissible activities." Brown, 14 MLC 1251-52. However, as the MTA correctly states, such evidence would be irrelevant if officers' salaries were truly proportionally chargeable to the union's activities. (MTA Brief, p. 118).

The Charging Parties contend that, in accord with Brown's language, the MTA must prove how much time its Union officers spent on chargeable activities. Absent a time-keeping system tracking the officers' collective bargaining conduct, they argue, the MTA is not entitled to any officers' salary fee. (Charging Parties' Brief, Vol. III, p. 165; Reply Brief, p. 43).

Synthesizing the Commission's previous reasoning and considerations, I use the following analysis when

assessing the costs of MTA officers. First, the Union must establish, by credible record evidence, that its officers have roles in governing the organization or otherwise sustaining its existence as a collective bargaining representative. Once that initial burden has been met, the Union officers' costs will be apportioned according to the MTA's overall chargeable expenditures, unless either party overcomes the presumption by proving a different allocation in fact.

Activities of the Division of Governance:

Program 1.1: Annual Meeting of Delegates.

All MTA officers, Board, Committee members and other representatives are elected at the Annual Meeting of Delegates, held at the Park Plaza Castle on May 10 and 11, 1991. The MTA does not pay delegates' expenses, but retains the services of a parliamentarian and a stenographer. The delegates approve the budget, vote on proposed resolutions and consider new business items. Visitors, including nonmembers, may attend the Annual Meeting. However, only delegates can be on the meeting floor and only members can be delegates. Delegates may attend pre-convention meetings, held at various sites throughout the state, for briefings about the upcoming Annual Meeting's topics and issues.

Customarily, MTA presidents arrive at the Annual Meeting site on the Wednesday before the meeting's commencement. Therefore, President Bacon checked into the Park Plaza Hotel on Wednesday, May 8, 1991. The next day, she hosted intensive meetings with the Parliamentarian, the Executive Director, the General Counsel, and the Chairs of the Bylaws and Rules Committee. An $800 room service bill was incurred in connection with the meetings. Bacon also appeared at a Penny on the Sales Tax campaign press conference.

At the Annual Meeting, the delegates approved six resolutions, four dealing with general public policy matters (including preservation of natural resources, foster care placement, school symbols and emblems), one on school-business partnerships, and one on reductions-in-force. Five new business items were adopted, concerning retired teachers, job opportunities for laid-off educators and Operation Reveille. Three bylaw amendments were adopted, all concerning technical internal governance matters. Finally, the MTA budget was approved and Board of Director elections were held. There was some discussion of political activity at the Annual Meetings; delegates were encouraged to promote the Penny campaign. Robert Reich, then a Harvard economist, delivered the keynote address on the importance of education in the international labor market.

The Charging Parties argue that Lehnert leaves open whether, or to what degree, the convention costs of an "affiliate parent" are chargeable. (Charging Parties' Brief, Vol. III, p. 134, 136). In concluding that nonmembers may be charged for local representatives' participation in affiliates' conventions, the Lehnert plurality clearly endorsed Ellis' reasoning that "[c]onventions such as those at issue here are normal events...and seem to us to be essential to the union's discharge of its duties as bargaining agent." Lehnert, 500 U.S. at 530, quoting Ellis, 466 U.S. at 448-449. Ellis so held, even though the convention at issue there involved considerable political content, including speeches by prominent politicians. 466 U.S. at 459. Therefore, costs incurred in connection with the MTA's Annual Meeting, at which MTA officials are elected and members set Union goals and policy, are chargeable.

The direct costs of 1.1, including the chargeable pre-convention meetings, totaled $81,553. The expense items included room rental, audio visual services, booths and displays, food, the President's reception, security, and awards and gifts. Expenses incurred by the Board of Directors and the Executive Committee are found in program 2.1 and 3.1, infra.

One program 1.1 cost is not chargeable. The costs of an annual fund-raising dance are found here. After the benefit, a total of $4,180 was donated to the Teachers Trust Fund and the MEA Professional Rights Fund. It is not clear whether the nonchargeable donation total has been netted from the costs detailed in MTA #1. Therefore, I deduct the donation from the chargeable costs here.

Total costs in 1.1: $115,664

Total chargeable costs in 1.1: $111,484

Program 2.1: Board of Directors.

The Board of Directors has five regular meetings annually, and usually several special sessions. During its 1990-91 meetings, the Board deliberations covered a range of issues, including: the MTA's finances, its internal retirement plan, the mileage reimbursement formula, collective bargaining, public higher education, salaries and economic benefits, the MTA's legislative program, members' rights and certification. The Board ratified the MTA/MATA collective bargaining agreement and discussed the health care crisis, the Conditions of Special Education Survey, and site-based decision making. During the course of its meetings, the Board considered political matters, like the Question-3 and Penny campaigns, electoral endorsements and the Persian Gulf War. In addition, the President, Vice-President and Executive

Director Treasurer gave reports to the Board, and it heard reports from the various councils and committees.

Board members are reimbursed for their expenses, such as mileage and meals, incurred for Board meetings and other activities, like attendance at TASCs. Board members remain full-time educators and do not receive a MTA salary. Its minutes demonstrate that the Board directed the Union's goals, policies, conduct and personnel during the year in question. While the Charging Parties correctly indicate that Board meetings often contained political content, they were never exclusively devoted to nonchargeable activity. Therefore, the Charging Parties have not rebutted the presumption of permissibility concerning overall Board meetings and functions.

However, Board members attend and participate in an array of MTA activities, and receive reimbursement for their costs under program 2.1. In connection with her appearance at the instant hearing, Alfond reviewed Board members' expense vouchers and identified their political activity expenses. A review of the segregated vouchers reveal instances of exclusively nonchargeable activity, like attendance at Q-3 training sessions. The costs connected with attendance at, or participation in, these exclusively nonchargeable activities, as identified by Alfond and later supplemented by the parties' stipulations, will be deleted from the otherwise chargeable program 2.1 costs.

Total costs in 2.1:	$139,638
Nonchargeable costs in 2.1:	$ 2,490[77]

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[77] The nonchargeable total is derived from the originally identified political expenditures of $2,238, as modified by paragraphs 10,11,13,14,15,17,18, 19, 21,22,25,26,27,33,34,35,37 and 38 of the parties' stipulations, and the Friend of Education stipulation. The nonchargeable total does not include any postage and mailing

Total chargeable costs in 2.1: $137,148

Program 3.1: Executive Committee.

The MTA's Executive Committee met at least seven times during 1990-91. During its meetings, the Committee discussed preliminary financial reports, local affiliates, assignments of new resolutions, appointments of chairs of committees, councils and special project groups and other matters related to the overall governance of the MTA. The Executive Committee also discussed Question-3, the Penny Campaign, political endorsements and similar matters. However, the record does not reveal that Committee meetings were ever exclusively devoted to nonchargeable conduct. Instead, the evidence demonstrates the Executive Committee's role as the Union's core governing body.

The costs for the Executive Committee included meals, mileage, meeting room rentals, audio-visual services and overnight lodgings for weekend meetings. Like Board members, Executive Committee members are full-time teachers and receive no salary from the MTA. When the Executive Committee attends meetings of the Board of Directors, their expenses are allocated to program 3.1.

While the overall presumption of chargeability of the Executive Committee and its meetings is unrebutted, the record reveals Committee members' costs incurred in connection with exclusively nonchargeable activities, like Crisis Committee meetings, legislative testimony and Q-3

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charges, or TASC meeting attendance expenses, because the record does not demonstrate that such costs are related to exclusively nonchargeable activity.

training. These isolated costs will be deleted from the overall chargeable totals.

Total costs in 3.1:	$60,799
Nonchargeable costs in 3.1:	$ 797[78]
Total chargeable costs in 3.1:	$60,002

Program 4.1: Officer and Management Support.

The salaries of the president, secretary to the president, and costs associated with the vice-president are charged to program 4.1. In addition, the costs for the president's apartment, provided because Bacon lived beyond commuting distance to Boston, are found here. While President Bacon did not keep time records, a summary calendar of her activities was prepared for the Board of Directors. This calendar reflects a range of activities, including meetings with the MTA officers and staff; attending the NEA conventions and meetings of the National Council of State Education Associations (NCSEA), an organization of presidents, vice-presidents and executive directors of state NEA affiliates; VOTE and MTA committee meetings; visits to locals, meetings with MTA governance bodies; Question-3 activities; and lobbying. Bacon, of course, attended the Annual Meeting, Board Meetings, and Executive Committee meetings.

The MTA bylaws do not clearly define the duties of its vice-president, so Bacon gave Murphy some specific assignments: to chair the Advisory Budget Committee and the Statewide Membership Committee; to be a key coordinator for the Williamstown Presidents' Track; and, to visit local associations as directed by the president. Like the president, the vice-president attends the Annual Meeting, Board Meetings, Executive Committee meetings,

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[78] The nonchargeable total consists of the $667 from Ex. 1107 and paragraphs 29, 30, 31 and 32 of the parties' further stipulations.

statewide conferences and other committees which he chairs. In 1990-91, Murphy received a stipend from the MTA, and his School Committee, in Somerville, received funding for a full-time release teaching partner.

Murphy also prepared a summary calendar, which reflects his attendance at various NEA convention and pre-convention meetings; a Vocational Education Conference; meetings on health care, the constitutional amendment, Williamstown, VOTE, Question-3, the Advisory Budget Committee, the Penny campaign, and with various MTA field staff. The health insurance crisis was one of Murphy's priorities, along with his work with the Union's Advisory Budget Committee.

Although the costs for the president's special projects and NEA national conferences are also found here, the bulk of program 4.1 expenses are personnel costs. The MTA has met its initial burden of establishing that its officers have a role in governing the organization. While it is undisputed that the MTA's president and vice-president engaged in nonchargeable activity during 1990-91, on this record I do not find that their political or other nonchargeable involvement was disproportionate to the MTA's overall nonchargeable activity. Therefore, I will apportion their costs based upon the MTA's overall proportion of chargeable expenditures.

Total costs in 4.1: $253,781

Total Chargeable costs in 4.1: To be determined

Program 5.1: NEA Convention.

The NEA convention is the national affiliate's Annual Representation Assembly. MTA sends about 250 delegates to the convention, with the majority elected by local associations. As with the MTA Annual Meeting, there is a pre-convention meeting to educate delegates about the issues. At the NEA convention, delegates elect officers,

adopt the NEA budget, and consider amendments to the NEA Constitution, Bylaws and Standing Rules, as well as new business items.

The Governance Division is responsible for the MTA delegations' support and logistics while at the conference. In addition, the MTA sends a representative to the NEA State Coordinators' meeting for advance planning, but the NEA pays most of those expenses.

Attendance at the NEA convention was considered a chargeable expense in Lehnert, because participation in the activities of the national affiliate was likely to be an important benefit of affiliation. Lehnert, 500 U.S. at 530. Therefore, program 5.1 is fully chargeable.

Total costs in 5.1: $163,613

Total chargeable costs in 5.1: $163,613

Program 5.2: MTA and NEA Elections.

Program 5.2 covers the Electoral Review Committee and the election of delegates for the NEA Convention and the MTA Annual Meeting. Most of the direct costs here are for ballot preparation and postage. These costs are pure governance expenses and the Charging Parties do not contest their chargeability. (Charging Parties' Brief, Vol. III, p. 158).

Total costs in 5.2: $56,574

Total chargeable costs in 5.2: $56,574

Program 6.1 Committee Administration.

The Governance Division provides administrative support to the array of MTA councils and committees. Each committee is assigned new business items at the Annual Meeting and has a MTA staff consultant assigned to provide support services. Committees are divided into four categories: committees of the bylaws; policy committees; program councils; and special project groups.

(a) Bylaws committees

The following eight committees are bylaws committees:

1. The Advisory Budget Committee advises the Executive Committee on budget and financial affairs and was chaired by Vice-President Murphy.
2. The Bylaws and Rules Committee reviews and makes recommendations concerning proposed amendments to the MTA's bylaws.
3. The Credentials and Ballot Committee supervises all MTA elections.
4. The Electoral Review Committee redistricts the MTA every four years and allocates delegates for the NEA convention.
5. The Hearing Committee brings recall proceedings against officers or Board members, if necessary. General Counsel Clarke was the Hearing Committee's consultant.
6. The Professional Ethics Committee provides training concerning the Code of Ethics of the education profession and adjudicates any charges brought against members. Staff Attorney Fader was the committee's consultant.
7. The Resolutions Committee reviews proposed resolutions and recommends them to the Annual Meeting. If a resolution is adopted, it is assigned to a division for implementation. The Committee does not have a role in monitoring implementation compliance. The six resolutions recommended to the 1991 Annual Meeting concerned business/education partnerships, rights to privacy, use of stereotyping emblems or mascots in schools, educational programs on the earth's

natural resources, foster care placement, and professional education.

8. The Retired Members Committee advocates for retirees.

All Committees of the Bylaws are pure governance entities -- that is, their function is to maintain the Union's associational existence, elect officers and carry on its affairs. The committees' costs, as detailed below, are fully chargeable.

Direct costs of Bylaw Committees:		$21,334
Advisory Budget Committee	$	5,009
Bylaws and Rules:	$	4,787
Credentials and Ballots:	$	5,642
Electoral Review:	$	358
Hearing:	$	614
Professional Ethics:	$	266
Resolutions:	$	2,760
Retired Members:	$	1,896
Chargeable costs of Bylaw Committees:		$21,334

(b) Policy councils

The policy councils implement and monitor on-going personnel policy requirements established by the Board of Directors or by the Annual Meeting.

1. The Board Negotiating Team represents the MTA in collective bargaining with the internal staff unions.
2. The Committee to Evaluate the Executive Director-Treasurer makes a performance evaluation recommendation to the Board of Directors.
3. The Equal Opportunity Council is composed of employee representatives and MTA members who monitor compliance with, and provide recommendations with respect to, the MTA's Equal

Employment Opportunity and Affirmative Action Policy.

4. The Minority Affairs Committee encourages minority involvement in MTA governance through activities like training workshops.
5. The Personnel Selection Team is composed of employee representatives and MTA members appointed by the President and the Executive Director-Treasurer to participate in the selection of personnel. The Team interviews final candidates for staff positions at the managerial and executive level and makes recommendations either to the Board of Directors or the Executive Committee. For certain positions, the appropriate division manager may participate in the meetings and discussions of the personnel selection team.
6. The MTA Retirement Plan Committee is composed of members of MTA management, employee representatives, MTA members and members of the Board. The Committee administers the retirement plan for MTA employees. General Counsel Clarke was the committee's management representative.
7. The Committee on Specific Objectives, a subcommittee of the Board of Directors, was established to streamline the specific objectives of the MTA and to propose changes to the MTA Bylaws. Clarke was the committee's consultant.

The initial six entities concern the terms and conditions of employment of MTA employees. The final committee is a pure governance group. Because the foregoing committees perform governance and personnel administration functions, they are fully chargeable. The Board Negotiations Team, the Committee to Evaluate the

Executive Director-Treasurer, the Equal Opportunity Council, the Minority Affairs Council, the Specific Objectives Committee and the Personnel Selection team had direct costs in 1990-91. One final policy group, the Statewide Membership Committee, is nonchargeable. The Committee designs the membership campaign for the following fall and makes recommendations to the Board of Directors.

Direct Costs of Policy Councils:	$19,006[79]
Chargeable Costs of Policy Councils:	$19,006

(c) Program councils

There are seven Program Councils, one for each major MTA division. The councils were initiated in 1990-91, to recommend programs, assist the divisions in monitoring trends, assist in implementing proposed programs and to submit an annual report. Each council was given a list of charges to implement during 1990-91, with working to defeat Question-3 the first charge on each council's list. However, I credit Alfond's consistent testimony that, in this instance, the enumeration of charges does not reflect a council's overall priorities. Each council will be separately considered.

Affiliate Services Council

Robert Bonazzi and Janet Strecker were staff consultants to the Affiliate Services Council. The council is an amalgamation of several prior committees and first met at the September 15, 1990 All Committees Meeting. The council developed three categories of charges: bargaining, organizational development and training. The council met again on October 11 to refine its list of charges. I credit Strecker's averments that Question-3 was not a

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[79] This figure includes the Specific Objectives Committee's costs of $172.

council charge or a discussion item. Nor was the Affiliate Services Council involved in the membership campaign.

A major Affiliate Services Council project was developing a collective bargaining manual, containing model contract provisions. The council also make recommendations to local associations about priority collective bargaining items. The record reveals that the Affiliate Service Council was involved only matters germane to collective bargaining. Therefore, its $4,226 costs are fully chargeable.

Communications Council

The Communications Council served as an adjunct to the Communications Division, and its concerns reflected the division's overall activities. The council examined the MTA TODAY, awarded Public Relations Grants, and developed a local public relations network, including supporting the concept of a higher education newsletter. Finally, the group advised and assisted the Division in developing its Williamstown program. The council only discussed Question-3 at one meeting; it had nothing to do with the Penny campaign, the constitutional amendment, or concerns about the state budget. As a supplementary body to the division, I will apportion the Councils's costs according to the Communications Division's percentage of chargeable expenditures.

Total Communications Council costs:	$1,714
Chargeable percentage of Division's costs:	5.4%
Chargeable Communications Council costs:	$ 93

Governance Council

The Council was designed to combine four committees: the Summer Leadership Conference Planning Committee, the NEA Convention Planning Committee, the

President's Track Planning Committee for Williamstown[80] and the Board of Directors Training Committee. While the Governance Council met three times during 1990-91, it never functioned as a fully integrated group. Instead, three of the four original subgroups continued to meet separately. While the Governance Council's preliminary charges included working to defeat Question 3, I find that neither the consolidated group or its component parts engaged in activity to that end. Since the Governance Council did not engage in nonchargeable activity and, instead, was concerned only with governance activities, its $9,294 costs are fully chargeable.

Governmental Relations Council

The Council develops and proposes the MTA legislative program for the next legislative session. The MTA does not seek to charge for this council's costs.

Higher Education Council

The Higher Education Council never convened. Instead, its functions were assumed by the Higher Education Leadership Council, described in Affiliate Services program 4.0, supra. The expenses allocated to the Council here were actually incurred by the Higher Education Leadership Council. Consistent with the Higher Education Leadership Council's costs in Affiliate Services, the $1,654 costs here are fully chargeable.

Human Relations Council

A preliminary charge received by the council was to communicate the MTA's moral support for educational personnel involved in union activities in other nations. Other charges included holding the Annual Human and

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[80] Williamstown and NEA Convention planning by the 1990-91 Council concerned events that would take place beyond the year at issue here.

Civil Rights Conference, soliciting nominations for the Human and Civil Rights Awards and sponsoring programs on recruiting minorities, educating children of color and conflict resolution. In addition, the council discussed the US role in the Persian Gulf War, the Massachusetts Association of Bilingual Educators Conference and possible MTA endorsement of the Gay Pride March. This council is nonchargeable.

Professional Development Council

The council's charges encompassed the range of the division's activities, including: the Wednesday Workshops, the Better Ideas Conference, SPECIAL EDition, other publications, the Conditions of Special Education Survey, certification and licensing issues, Williamstown and Project TEACH. As an adjunct of the Professional Development Division, the Council's costs will be apportioned according to the Division's chargeable costs.

Total Professional Development Council costs:	$ 7,225
Chargeable percentage of Division's costs:	50.1%
Total chargeable council costs:	$ 3,620
TOTAL PROGRAM COUNCIL COSTS:	$30,901
CHARGEABLE PROGRAM COUNCIL COSTS:	$18,887

(d) Special project groups

The committee reorganization prompted the creation of a number of special project groups, including: Early Retirement, HealthCare Benefits Study Group, Legal Services Policy Review, Total Quality Review, Occupational Education/Vocational Education, School Nurse Study Group, Small/Midsize Local Training, Strategic Planning and Technology, and, the Task Force on Organizational Endorsements for Statewide Offices. Since the

record is replete with evidence concerning health care collective bargaining concerns during 1990-91, the health care group's costs are fully chargeable. Likewise, a group concerned with bargaining unit employees' early retirement options is necessarily related to terms and conditions of employment and is fully chargeable. The other major groups are:

Member Compensation Task Force

The group's objective was to formulate mechanisms for improving the compensation and benefits of school personnel. One component of the project was development of a Career Advancement Plan (CAP), a proposal to generate revenue through early retirement that could be added to teacher salaries. The group's $665 costs are fully chargeable.

Business Relations Committee

This group was organized to investigate business-teaching partnerships. The committee met five times during 1990-91, focusing on two primary projects: planning a business/education conference and writing a guidebook on creating effective school business partnerships. The committee's $2,297 expenses are fully chargeable.

Direct costs of Special Projects Groups:	$5,051
Nonchargeable Special Project	
Group Costs:	$ 709
Task Force on Organizational Endorsements	$ 238
Organizing	$ 52
Member Lobbying	$ 156
Campaign for Opportunity	$ 236
Chargeable costs:	
Small/Mid size Locals:	$ 42
Health Care Benefits:	$1,026

Early Retirement:	$ 312
Member Compensation Task Force:	$ 665
Business Relations:	$2,297
TOTAL CHARGEABLE SPECIAL PROJECT GROUP COSTS:	$4,342

(e) All committees

Program 6.1 contains costs involving all of the MTA's councils and committees. As previously indicated, an All Committee Meeting is held annually, and its costs are allocated to program 6.1. In addition, a Committee Chair Meeting was held in September, to clarify the restructuring of the committees and councils and to review the committees' goals, charges and policies. It is reasonable to infer that both MTA staff time spent in connection with the committees and councils and All Committee expenses reflect the chargeable and nonchargeable activities of the underlying entities. Therefore, All Committee expenses and Governance program 6.1 division staff time and general costs will be apportioned according to the percentage of chargeable committee and council costs.

Direct All Committee costs:		$ 5,647
Committee Chair Meeting:	$1,160	
Miscellaneous expenses:	$ 509	
All Committees Meeting:	$3,978	
TOTAL COSTS IN 6.1:		$104,566
Direct costs of Committees:		$ 76,123
All Committee costs:		$ 5,647
General costs in 6.1:		$ 22,796
TOTAL CHARGEABLE DIRECT COSTS OF COMMITTEES:		$ 63,569
Chargeable percentage of direct committee costs:		83.5%

CHARGEABLE PROPORTION OF PERSONNEL AND ALL COMMITTEE COSTS:	$ 23,750
TOTAL CHARGEABLE COSTS IN 6.1:	$ 87,319

Program 7.1: Leadership Conference.

The 19th Annual Summer Leadership Conference took place on August 13-17, 1990 at Williams College, Williamstown, Massachusetts. Alfond managed the conference, the conference budget, site planning, logistics and schedules. In addition, Alfond coordinated, among other events, a theatrical event box office series, the Board of Directors' Leadership Development Program, an opening fair, and the MTA Movie Loft. The conference was attended by approximately 1,000 people.

Williamstown is attended by local leaders, MTA staff, the Board of Directors, MTA officers and presenters. As previously discussed, the conference is broken into tracks: ten major tracks, six mini-tracks and five special tracks. The major tracks were Communications; Instruction and Professional Development; Labor School; Contract Negotiation; Contract Maintenance; Legal; Presidents; The Association, the Contract and Site-based decision making, Special Education; and, Treasurers. Mini-track topics included Higher Education, Occupational Education/Vocational Educational, Organizing, Research, Retirement and School Administrators; while the Special Tracks were Conflict Resolution Training for Facilitators, Project TEACH, MTA Board of Directors' Leadership Development Program, Beat CLT and National Pay Equity Study. Each track had its own agenda consisting of various presentations and workshops. The conference also features social and recreational activities. Programs and

activities begin at 6:30 a.m. and last until at least midnight.

The Presidents' Track at Williamstown is developed by the Governance Division. New local leaders receive most of their training here, learning local association management skills and becoming acquainted with the legal aspects of running a local. The Presidents' Track opened with a session by Philip Johnson, Secretary of Human Services, dealing with the interconnection between education and other human services. Other track sessions included Communicating Your Way Through a Crisis, Health Insurance and Collective Bargaining Obligations, Public Employees' Health Insurance in Plain English, The Physicians' Response to National Health Care, Media Relations 101: A Primer on Working with the Press, Radio and TV, Dynamics of Bargaining, Dynamics of Grievances and Making the Most of Your UniServ Consultant. The sessions included in the Presidents' Track did not concern the Question-3 campaign. Instead, the track tackled the range of activities and issues faced by leaders in managing a local association and its collective bargaining responsibilities. To the extent that the track touched upon nonchargeable subjects, it was incidental to its prime purpose and function. Therefore, the track is fully chargeable.

The Williamstown conference, however, included nonchargeable events. As previously described, the second conference day was "Beat CLT Day." Beat CLT activities included a general session, a morning session and an afternoon session. While the MTA concedes that its "Beat CLT Day" activities are nonchargeable, it argues that they represent only 6% of the total events undertaken on Tuesday, August 14 and that the day's costs should be reduced only by that amount. (MTA's Brief, p. 143).

I disagree. While the MTA correctly notes that the Q-3 sessions lasted only approximately 4 hours; over 50 separate functions were held. The day's goal was to familiarize all delegates with Question-3 and the Union's planned campaign. Indeed, as described in MTA TODAY: "[N]early 1,000 MTA activists attended a full-day session on Question-3, where they learned the threat it poses to education, and the MTA's plan for victory." (MTA Exhibit 2, p.1). Although several chargeable MTA sessions took place on Tuesday, and social activities continued unabated, the day's purpose and theme was devoted to nonchargeable activity. Moreover, the chargeable sessions, like the parliamentary procedure group, were roughly offset by other nonchargeable activities, such as the VOTE meeting. Therefore, I reduce the five day conference charge by one day's costs.[81]

The MTA asserts that the true cost of the Williamstown conference is $210,350, not the $88,359 listed in its demand, because conference revenue was erroneously netted from the total conference costs. (MTA Brief, p.143). The $210,350 figure, however, includes room and board charges that conference delegates ultimately repaid to the MTA. Therefore, delegates' room and board charges, like box office expenses, are not a true conference cost to the MTA. Accordingly, "Beat CBT Day"

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[81] While I delete an approximate value of the costs incurred in staging "Beat CLT Day," I have not discounted MTA staff time, if the record indicates that an individual attended the conference, but not Q-3 events. The value of the informal contacts between and among staff members and Union leaders warrant staff charges for conference attendance, irrespective of the on-going Q-3 programs.

represents a $17,672 expense -- the total cost of $88,359 divided by five.[82]

Finally, I accept the MTA's calculations concerning the amount of other nonchargeable activities conducted at the Summer Leadership Conference. The truncated organizing track, political action track items and the Human and Civil Rights program are all nonchargeable. The MTA's calculation that, overall, these nonchargeable events totaled 12% of a day's activity is a fair and reasonable approximation of their value. (MTA Brief, p. 144). Therefore, I reduce the Williamstown conference's costs by a further $2,121. I am persuaded, however, that the rest of the conference program is chargeable because it is either germane to collective bargaining activities and skills, or it fosters an awareness of issues relating to the terms and conditions of employment of educational personnel.

Total costs in 7.1:	$88,359
Less cost of Beat CLT Day:	($17,672)
Less cost of Organizing, Political Action and Human Relations programs:	($ 2,121)
Total Chargeable costs in 7.1:	$ 68,566

Program 7.2: Conference Administration.

Governance Division personnel coordinate all conferences for all MTA divisions. Logistics for meetings or conferences held outside of the MTA offices are the responsibility of the conference administrator. Internal meetings are handled by one of the Governance secretaries. The conference administrator devotes most of her time to the Annual Meeting, the NEA Convention and meetings of the Board of Directors and Executive Commit-

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[82] The $88,359 total cited in MTA #1 appears to include both direct and general costs.

tee. Because the costs here are related to fully chargeable activity, I consider all division personnel time to be chargeable. However, I delete a $1,964 expense related to a nonchargeable Teachers Trust Fund activity.

Total costs of 7.2: $57,942

Chargeable costs of 7.2: $55,978

Program 7.3: Policy, Documents and Projects.

Alfond maintains and administers the policies of the MTA by maintaining a policy book; providing research on policy matters to members, Board of Directors and staff; maintaining the Bylaws and Rules; attending meetings of the Bylaws and Rules Committee; and publishing the ALERTS, a staff bulletin about Board and Executive Committee meetings. I concur with the MTA's assessment that Alfond's activities are a chargeable governance function.

The direct costs allocated here, however, contain nonchargeable items. Program 7.3 contained an emergency expense account that funded $6,807 in nonchargeable donations. It also contained expenses totaling $2,731 for unidentified "Eastern States" and "Misc. Projects." As previously detailed, the Statewide Crisis Committee's activities and expenses are nonchargeable, and further $869 will be deducted here. The $3,000 costs of chair rental for the Annual Meeting, however, is chargeable.

Total costs in 7.3: $25,275

Chargeable costs in 7.3: $14,868

Program 8.1: Division Management.

Allocated to program 8.1 are the costs for temporary help and training, Alfond's costs for managing the division, and the costs for subscriptions, dues and office equipment. The division management program is proportionally chargeable. All costs of program 4.1, however, have been excluded from all calculations.

Total costs in Programs 1-7.3, excluding program 4.1:	$852,770
Chargeable costs in Program 1-7.3, excluding program 4.1:	$795,892
Chargeable proportion of Governance costs:	93.3%
Total costs in 8.1:	$ 80,678
Chargeable costs in 8.1:	$ 75,273

CHARGEABLE COSTS OF THE GOVERNANCE DIVISION (Excluding Program 4.1)

Total costs:	**$933,448**
Chargeable costs:	**$871,165**

XII. DIVISION OF ADMINISTRATION AND PERSONNEL

Overview

The Division of Administration and Personnel is responsible for the MTA's human resources, property management, and the overall supervision, planning and implementation of the MTA's programs. In 1990-91 the division consisted of the executive director-treasurer, an executive assistant to the executive director-treasurer, a secretary to the executive director-treasurer, a personnel manager, purchasing agent, division secretary and the maintenance mechanic.

Edward Sullivan, the Executive Director-Treasurer, was the chief financial and operating officer of the MTA under the general direction of the Board of Directors. Sullivan represented the MTA to outside groups and agencies; provided information and advice to the officers, the Board of Directors and Executive Committee; and planned and implemented organizational goals. Additionally, he supervised and evaluated the management staff,

recommended the annual budget, and monitored finances. Sullivan attended all of the meetings of the Board of Directors, Executive Committee, the Annual Meeting and most of the pre-convention meetings.

Sullivan was involved in all staff employment decisions, bargaining with the internal employee organizations, resolving employee grievances, and other aspects of general employee relations. He secured the financing for the 1990-91 renovations to the MTA headquarters building. Sullivan also met regularly with Personnel Manager Donna Hoffman regarding building renovations, leased property, MATA and MTASO negotiations, pension amendments, budget issues, and held regular management meetings.

Sullivan supervised the Governmental Relations Division in its lobbying and other political activities. While Sullivan did not keep time sheets, like President Bacon and Vice-President Murphy, he maintained a summary calendar for the Board's review. His calendar reflects, among other items, meetings on Question-3, attendance at Williamstown, VOTE Board meetings, Executive Committee and MTA Board meetings, meetings with local associations, meetings with the Park Street Office Corporation -- which functions like a Chamber of Commerce, the Higher Education conference, management meetings, meetings with FSO and MTASO, Advisory Budget Committee meetings, TEAM meetings and arbitrations.

The executive assistant was the liaison between Sullivan and other staff. Her activities included coordinating interviews for an organizational structure study, researching the organization's computer needs, and tracking the status of on-going Board and Executive Committee actions. She was also the staff assistant to the

Health Care Committee and provided follow-up on items addressed at management meetings.

Personnel Manager Hoffman's responsibilities included all aspects of personnel matters, including recruitment, personnel policy and employee records. She was involved in negotiations with the various internal unions, and with implementing and monitoring compliance with the collective bargaining agreements. Hoffman's property management responsibilities included overseeing the day-to-day operations, as well as the renovations, of the MTA headquarters building and negotiating the leases for the six regional offices. Her overall responsibilities, however, did not extend to the MTA's-political activities.

The personnel administrator handled the personnel policies of the MTA, including employee benefits and the retirement plan. She was a consultant to the MTA Retirement Plan Committee, the Equal Opportunity Council and the Personnel Selection Team.

The MTA has a centralized purchasing system, overseen by Hoffman, and administered by a purchasing agent. Generally, a division requisitioning goods or services also designates the appropriate program area for the charge. Standard office supplies are charged to Administration and Personnel program 2.0, the general office supplies account.

The maintenance mechanic cares for the building and its fixtures. In 1990-91, he was also involved in the ongoing building renovations.

The Commission, in Newton I, created two categories of overhead expenditures: those "necessary to maintain an organization's existence" and those "directly affected by the amount of [nonchargeable] activity undertaken by the union." Newton I, 13 MLC at 1596. The Commission has concluded that "necessary" overhead is presumptively

entirely chargeable, "provided the union has produced some evidence that the expense was incurred in connection with the union's function as a collective bargaining agent." Id. As the Commission noted: "It would be difficult, if not impossible, to determine whether or to what extent such expenses are affected by the amount of [nonchargeable] activity undertaken by the union. Indeed, as the court recognized in Ellis, the union presumably would incur such expenses in essentially the same amount to operate at all..." Id. This fully chargeable presumption can be rebutted "only with evidence that the expenditure was actually incurred in furtherance of an exclusively impermissible activity..." Id.

Examples of fully chargeable overhead cited by the Commission include rent, insurance, building maintenance, audits and accounting. Id. The Commission presumed that rent was chargeable,"even if the union also uses the same space for some activities which are [nonchargeable]." Additionally, bank charges and bonding have been presumed chargeable. See also, Brown and Chicopee Firefighters, 14 MLC at 1255-56.

Similarly, federal cases have considered expenses like accounting, personnel and membership records to be fully chargeable. Antry, 552 N.E.2d at 345-347. Additionally, Bromley approved an arbitrator's designation of administrative matters like dealing with staff problems, reviewing mail and paying bills, as fully chargeable. Other 100% chargeable expenses included liability insurance, fidelity bond premiums and building renovations. Bromley, 843 F. Supp. at 1156.

Overhead expenses that are directly affected by the amount of nonchargeable activity undertaken by the union are presumed to be chargeable "in the same proportion as the union's activities are found to be allocable to

[chargeable] activity." Newton I, 13 MLC at 1596. Examples of proportionally chargeable overhead include telephone costs, administrative salaries, postage and supplies. Id. The presumption of proportional chargeability can be rebutted by evidence that "the Union's actual expenditures...were greater than the proportional allocations." Id., at 1597. On the other hand, a union can also rebut the presumption by demonstrating that an overhead expense was incurred in the pursuit of an exclusively chargeable activity.

Activities of the Division of Administration and Personnel:

Program 1.0: General Administration.

The majority of Sullivan's salary and benefits are allocated here. Sullivan's activities as supervisor of MTA managers and other staff, his involvement in the annual budget process, and his interaction with the officers, Executive Committee and Board of Directors, are under this program. Additionally, Hoffman's personnel responsibilities are in program 1.0.

Labor relations costs, including collective bargaining, contract management, and meetings of the various MTA labor-management committees, are allocated here. Program 1.0 also includes MTA budget development and accountability; personnel reports; and, the MTA's contingency account. The Executive Committee authorizes transfers from the contingency account to other MTA accounts. Therefore, contingency account expenses have been addressed when reviewing the costs of other divisions.

Management meetings, negotiating funding for building repairs and renovations and reviewing financial reports are activities charged to program 1.0. As demonstrated by the division's quarterly reports, activities related

to Question-3, the state budget, TEAM, VOTE, the Penny campaign and elections were also allocated here. These political activities were performed by Sullivan.

The MTA asserts that while Sullivan's salary is certainly proportionally chargeable, Hoffman's activities are arguably fully chargeable. Due to the division's bookkeeping, the MTA concedes that it is not possible to segregate the proportionally chargeable from the arguably fully chargeable program 1.0 activities. Therefore, program 1.0, in its entirety, is proportionally chargeable.

General costs in 1.0 $ 271,018

(a) Direct Costs in 1.0

Dues	$ 3,670
Subscriptions	$ 1,243
Corporate Counsel	$ 55,383

Outside counsel were retained to provide, among other items, general corporate advice, labor relations assistance, and, advice on retirement matters. The expenditures include: $2,494 to Hill and Barlow for services to the Committee to Evaluate the Executive Director; $161 to Hill and Barlow for advice on taxation of political expenditures; $2,290 to Dwyer & Collora for advice on campaign finance law; $6,386 to Mintz, Levin for advice on the MTA retirement plan; and $8,665 to Brown, Rudnick as labor counsel.

EEOC Officer $ 15,000

The MTA employed a consultant to serve as its EEOC officer.

Management Consultants	$17,473
Management Staff Meetings	$ 6,840
Labor/Management Projects	$ 6,040
Minority Affairs	$ 8,241

The division's involvement in the Minority Affairs Committee is in program 1.0. While the expenses of the

Committee are allocated to the Governance Division, staff time assisting the committee with research and the production of informational brochures is charged here.

Donations $1,308

Donations included $960 to pay for MTA officers, members and staff to attend the Cushing-Gavin and Dubin Award dinners honoring outstanding members in the labor community. Donations to the United Way are also charged here.

Total direct costs in 1.0 $115,202

The program 1.0 direct costs contain a combination of chargeable and nonchargeable expenses. Because program 1.0 expenses are chargeable in proportion to the Union's overall chargeable activity for the year in question, the nonchargeable costs will not be deleted from the total figure. This differs from the methodology used in calculating the chargeable proportion of divisional management expenses. There, misallocations of exclusively nonchargeable activity erroneously charged to divisional management (e.g. Affiliate Services 5.0 instead of 4.2) were deleted from the program totals before the chargeable percentages were calculated. Therefore, the MTA's overall chargeable activity percentage will reflect the previous deletions of misallocated nonchargeable activities.

Total Costs in 1.0: $386,220

x chargeable percentage of MTA costs

TOTAL CHARGEABLE

COSTS IN 1.0 To be determined

Program 2.0: Property Management.

The upkeep of the MTA's headquarters building at 20 Ashburton Place and, in 1990-91, supervision of its renovations are charged here. Program 2.0 also includes lease negotiations for the regional offices, monitoring the

regions' property and equipment costs, resolving tenants' problems in the headquarters building, and time spent on purchasing supplies, equipment and on telecommunications management. Specific activities include issuing renewal notices for tenants, searching for properties to lease for the regional offices, and renovation meetings.

The costs in program 2.0 are primarily the salaries of the divisional personnel with property management responsibilities; namely, Hoffman, a secretary and the purchasing agent. Direct costs in 2.0 are $319 for dues and subscriptions.

I concur with the MTA's assertion that property management costs, insofar as they are incurred on behalf of the MTA, are fully chargeable as a necessary overhead expense. The demand, however, identified property management costs as proportionally chargeable. Due to the extensive evidentiary record developed with respect to the building's operation and its renovation, however, the Charging Parties are not unduly prejudiced by this change.

The record demonstrates that the MTA traditionally leases space in its headquarters building and that, during the year in question, substantial renovations were ongoing. The Charging Parties argue that the MTA only occupied 6 out of the 9 floors of the building, for an occupancy rate of 67%. During the renovations, the MTA's traditional tenant occupancy rate declined. Although the MTA did not have offices in every portion of the untenanted space, divisions were constantly being relocated throughout the building to facilitate the extensive renovations. Therefore, I conclude that, during the year in

question, the MTA had control over, and functionally used or occupied, 80.45 % of 20 Ashburton place.[83]

A proportion of building operation costs devoted only to MTA functions can be isolated from those incurred on behalf of tenants. Hoffman calculated the cost to MTA of operating 20 Ashburton place, independent of the cost of services provided to tenants, as follows:

Gross costs of building operations:	$711,941
Less expenditures by MTA for its benefit only - ($63,419 electricity for MTA space) - ($112,540 renovations for MTA space) - ($5,478 record retention for MTA material)	$181,437
	$530,505
x tenant occupancy percentage	19.55%
Costs of building operations for rental portion of 20 Ashburton	$103,713
MTA's building operation costs	$608,229
Percentage of operational costs devoted only to the MTA	85.4%[84]

The percentage of building operational costs devoted to the MTA space will be applied to the property management charges incurred in program 2.0, thereby generally accounting for the costs associated with tenant activities.

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[83] I rely on Hoffman's averments and the consistent testimony elicited during her cross-examination. (Transcript pages 4053-4064).

[84] The MTA contends that 97% of the building operation costs are devoted to the MTA, by dividing the isolated MTA costs from the building operation costs in MTA #1. (MTA Brief, p. 261). However, it is inconsistent to use the MTA #1 figure to determine the percentage of operational costs when $624,885 was not used as the baseline figure for isolating MTA's costs.

This reduction is reasonable, given that the program concerns overall property management, including regional office concerns.

Total costs of 2.0	$66,277
x proportion of MTA only costs (85.4%)	$56,601
CHARGEABLE COSTS IN 2.0:	$56,601

Program 2.2: Building Operation.[85]

The Building Operation program provides for the operation, maintenance and tenant services of 20 Ashburton Place. Operation and utility costs, taxes, security services, and equipment maintenance and repair costs are found here. Building Operations also provides for nondepreciation items like payment of the interest on the original mortgage and projected interest on the construction loan. As previously calculated, the portion of the building operations account devoted only to the MTA is $608,229. The Commission has considered such necessary overhead costs to be fully chargeable. See Newton I, 13 MLC at 1596.

TOTAL BUILDING OPERATION:	$711,941
CHARGEABLE BUILDING OPERATION:	$608,229

Program 3.0: Personnel administration and employee relations.[86]

All of the activities of the personnel administrator are allocated to program 3.0. As previously indicated, the personnel administrator serves as consultant to the MTA's

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[85] In MTA #1, Building Operations appears apart from other Administration and Personnel programs, but it is more logically analyzed here.

[86] At one time, the division budget had four program numbers. Program 4.0 references in the general ledger are included here.

personnel committees and councils and administers the MTA's personnel policies, benefits and plans. In addition, the expenses of internal employee groups like the Supervisor's Network, composed of MTA's front-line supervisors who meet to discuss common work place concerns, are allocated here.

Administrative support provided to ESC is also included in program 3.0. ESC pays the MTA both a management fee and a fee for personnel services. The management fee of $5,171 was netted from the total costs for program 3.0 in the instant demand. The MTA acknowledges that the personnel fee of $22,458 should also have been netted. Direct costs in program 3.0 total $69,450, and include expenses for dues, subscriptions, recruitment and staff development.

The MTA contends that the program 3.0 costs should be fully chargeable, because a union must administer its benefit plans and personnel policies irrespective of its political or ideological activities. (MTA Brief, p. 262). The Charging Parties, on the other hand, argue that personnel administration expenses are proportionally chargeable. (Charging parties' Brief, Vol. III, p. 182).

Contrary to the Charging Parties' assertions, the MTA's personnel administration costs are not the type of expenditure that would be directly affected by the amount of nonchargeable activity undertaken by the MTA. Instead, the costs associated with administering the Union's personnel policies and benefit plans would likely remain constant, irrespective of the nature of any undertaken activities. Therefore, the program 3.0 expenses are presumptively fully chargeable. See, e.g., Antry, 552 N.E. 2d at 345-346; Bromley, 843 F. Supp. at 1156.

Total costs in 3.0: $225,932

Less ESC Personnel costs ($22,458)	$208,643
CHARGEABLE COSTS IN 3.0:	$208,643

Chargeable costs of the Division of Administration and Personnel

Total costs:	**$649,602**
Chargeable costs in program 1.0:	**To be determined**
Chargeable costs in programs 2 and 3:	**$265,244**

Chargeable costs of Building Operations

Total costs in Building Operations:	**$711,941**
Chargeable costs in Building Operations:	**$608,229**

XIII. OTHER ADMINISTRATIVE DIVISIONS AND PROGRAMS

The Division of Finance and Accounting.

Finance and Accounting maintains all of the Union's financial data and implements all of its financial transactions. The division manages accounts payable and receivable, maintains membership data, keeps time and expenses records and issues pay and expense checks. At the conclusion of 1990-91, the division consisted of nine individuals, Richard Anzivino -- the director, a budget specialist, a finance coordinator, a membership coordinator and five clerks or assistant clerks.

While the MTA asserts that Finance and Accounting costs are fully chargeable, the Charging Parties assert that they are only proportionally chargeable, because the division spent some unquantifiable amount of time working with VOTE and on the Q-3 campaign. (Charging

Parties' Brief, Vol. III, p. 175). The record, however, details the time spent on such matters.

Finance and Accounting had a limited role in the MTA's nonchargeable activity. The division's Q-3 involvement was limited to calculating the value of employees' time for campaign finance report filings. Anzivino estimated that the initial spreadsheet set-up took approximately ½ to 1 hour to accomplish, and each data run thereafter took about 10 minutes. The division had a role in administering the Professional Rights Fund, which required approximately 10 to 15 minutes of the budget specialist's time per month. Finally, the finance coordinator devoted about 10 hours per fiscal year to administering the VOTE account. The division's total direct involvement in nonchargeable activity is de minimis. Therefore, the MTA's accounting costs are fully chargeable. See Newton I, 13 MLC at 1596; Brown and Chicopee Firefighters, 14 MLC at 1253 n.9.

Total costs in Finance and Accounting: $565,908

Chargeable costs in Finance and Accounting: $565,908

Printing and Mailing.

Seven employees work in Printing and Mailing: a supervisor and his assistant, two printers, two machine operators and a general assistant. While all MTA divisions use Printing and Mailing's services, Governance is the largest customer, with Board and Executive Committee mailings, Williamstown and Annual Meeting materials and related services and the NEA convention.

As previously described in the Communications section, each division initiates printing orders with job tickets. The Printing and Mailing Supervisor then calculated the nonprofit cost of each job and generated an

internal invoice. As a general rule, the cost of jobs remained within the Printing and Mailing budget.

When the direct cost (not the labor cost) of a job was to be charged back to another division, or when the job was for an outside customer, Printing and Mailing would forward its invoices to Anzivino. Anzivino would then "charge back" the divisions, or bill the customers. In 1990-91, a total of $39,477 was charged back to other divisions: $6,985 to Affiliate Services, $2,156 to Communications, $1,606 to Governance, $615 to Professional Development and $28,201 to Governmental Services.

During 1990-91, Printing and Mailing performed $56,290 worth of work for non-MTA customers, $11,973 for ESC and $44,317 for other customers. The income from ESC was offset from the total costs of the division in MTA #1, but income from other customers was not.

MTA did in-kind printing and mailing contributions for TEAM and the value of the contributions were recorded on the Union's Q-3 campaign and political finance forms. By referring to the underlying invoices, the MTA states that its TEAM contributions totaled $5,446. (MTA Brief, p. 264). However, the filed campaign finance forms indicate a total printing and mailing contribution value of $9,564.65.

It is undisputed that Printing and Mailing printed material with political content. However, despite the workload laments of Supervisor Sal Uglietta[87], the record does not disclose that the production of political material was disproportionate to the MTA's political activity as a whole. Indeed, the internal Question-3 invoices (CP Exhibits 1297, 1299, 1303, 1304, 1305, 1309, 1310)

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[87] I credit Alfond's testimony about her subordinate Uglietta's propensity for exaggeration in his quarterly reports.

represent only approximately 3% of the department's total costs. Therefore, after deleting the value of the TEAM contributions, Printing and Mailing's costs will be proportionally charged.

Total costs of Printing and Mailing:	$616,689[88]
Less value of contribution to TEAM ($9,565)	$607,124
x chargeable percentage of MTA total costs	
Chargeable costs of Printing and Mailing	**To Be Determined**

Management Information Systems[89]

M.I.S. is responsible for the MTA's computer systems. The division maintains lists of data, such as the names and addresses of local leaders, prints the Union's paychecks and provides word processing and clerical support to all divisions, when needed. M.I.S. did $93, 732 worth of work for outside customers, including ESC, which is offset from the division's costs.

Total costs of M.I.S.:	$657,613
x chargeable percentage of MTA total costs:	
Chargeable costs of M.I.S.:	**To Be Determined**

Other Overhead Programs:

A number of large expenses are grouped into programs that fall outside the divisions. They are Telephone and Supplies, Depreciation, Termination and Severance Pay, and Local Support.

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[88] In its Brief, the MTA understates the Printing and Mailing costs reflected in MTA #1 by approximately $300,000.

[89] M.I.S. includes, and is sometimes referred to as, Data and/or Word Processing.

Telephone and Supplies are overhead expenses of the Boston headquarters. Regional office telephone and supply expenses appear in each office's budget.

Total costs of Telephone
and Supplies: $191,862
x chargeable percentage of MTA costs
Chargeable costs of Telephone and Supplies **To Be Determined**

The Termination and Severance Pay area includes employees' accrued vacation, personal and sick leave, as well as any severance pay.

Total costs of Termination
and Severance: $224,905
x chargeable percentage of MTA costs
Chargeable costs of Termination and Severance: **To Be Determined**

Depreciation is the noncash cost, distributed over a period of years, of the loss in value of property such as capital equipment and the MTA building. The Charging Parties argue that since depreciation of the building is included, the depreciation amount should be reduced to reflect the proportion of 20 Ashburton Place actually occupied by the MTA. (Charging Parties' Brief, Vol.III, p. 185). However, the building is owned by the MTA and is an asset of the corporation, for which the Union incurred a historical overall cost. It is reasonable to depreciate that overall cost, irrespective of tenancy, over time. Furthermore, other assets, apart from the headquarters building, are covered by the depreciation calculations.

Total Depreciation costs: $158,427
x chargeable percentage of MTA costs:
Chargeable costs of Depreciation **To Be Determined**

Local support is a program administered by Finance and Accounting to partially reimburse locals for certain expenses. The MTA asserts that local support was erroneously considered nonchargeable in its demand. It now takes that position that because the chargeability of local support is determined at the local level, in accord with Brown and Chicopee Firefighters, 14 MLC at 1252, n.8, in this proceeding local support is neither chargeable or nonchargeable. (MTA Brief, p. 267). The Charging Parties disagree, asserting that since local support costs were used to inflate the instant demand, the MTA should have demonstrated how the money was spent by the locals. Without such an explanation here, the costs are considered nonchargeable. (Reply Brief, p. 21 and n.26).

Notwithstanding the Charging Parties' objections, the local support costs will be withdrawn from the present equation. Among other reasons, it is more expedient to demonstrate local support costs during a local amount hearing, because local witnesses will not be required to appear before the Commission twice. Instead, on one occasion the Commission could hear testimony concerning the related MTA and local expenses, thereby also conserving limited Commission resources. Therefore, the $811,742 in Local Support will be deleted from the MTA's overall costs.

After reviewing all MTA divisions and programs, I now total the Union's chargeable and nonchargeable costs.

XIV. CHARGEABLE COSTS OF THE MTA

DIVISION	TOTAL COSTS	CHARGEABLE COSTS
AFFILIATE SERVICES	$5,829,385	$4,517,260

LEGAL SERVICES	$1,610,896	$ 55,672
GOVERNMENTAL SERVICES	$1,427,844	$ 0
COMMUNICATIONS	$ 784,603	$ 41,752
PROFESSIONAL DEVELOPMENT	$ 507,487	$ 261,469
RESEARCH	$ 252,081	$ 209,649
GOVERNANCE (Excluding Program 4.1)	$ 933,448	$ 871,158
SUBTOTALS	$11,345,744	$5,957,989
CHARGEABLE PORTION OF MTA TOTAL COSTS = 52.5%		
Proportionally Chargeable Divisions and Programs:		
GOVERNANCE 4.1	$253,781	$ 133,235
PRINTING & MAILING	$616,689	$ 323,762
M.I.S.	$657,613	$ 345,247
TELEPHONE & SUPPLIES	$191,862	$ 100,728
TERMINATION & SEVERANCE	$224,905	$ 118,075
DEPRECIATION	$158,427	$ 83,174
ADMINISTRATION & PERSONNEL 1.0	$386,220	$ 202,760
Final Divisions and Programs:		
ADMINISTRATION & PERSONNEL 2.0 AND 3.0	$292,209	$ 265,244
FINANCE & ACCOUNTING	$565,908	$ 565,908
BUILDING OPERATIONS	$711,941	$ 608,229
TOTALS	$ 15,081,144	$8,704,351

XV. CONCLUSION

During 1990-91, the MTA had a total of 60,276 full-time equivalent members and agency fee payers. The total chargeable costs for 1990-91 established in this proceeding are $8,704,351, for a per capita cost of $144.41. This per capita cost represents 66.5% of the total $217 dues amount -- and $26.29 less than the amount demanded.

RECOMMENDED ORDER

WHEREFORE, based on the foregoing, it is ORDERED that the Massachusetts Teachers Association (Union) shall:

1. Cease and desist from demanding that the Charging Parties pay an agency service fee for 1991-92 in excess of $144.41.
2. Not seek the discharge of or any other sanction against any Charging Party for failing to pay an agency service fee for 1991-92 in excess of $144.41.
3. Release to the Charging Parties $26.29 of the monies held in joint escrow, plus all accrued interest allocable to the $26.29 to the date of dissolution of the escrow account.
4. Implement the terms of the settlement agreement (Joint Exhibit #1), thereby calculating the appropriate agency service fees for the MTA and the NEA for each year between, and including, 1987-1988 through 1991-1992, releasing from escrow to the Charging Parties the excess fees, plus all accrued interest allocable to the excess fees to the date of dissolution of the escrow accounts.

5. Post in all places where notices are normally posted for bargaining unit members, and leave posted for a period of not less than thirty (30) days, copies of the attached Notice to Employees.
6. Notify the Commission in writing within ten (10) days of receipt of this decision and order of the steps taken to comply therewith.

SO RECOMMENDED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

/s/
Tammy Brynie
Specially Designated Commission Counsel

APPENDIX D

AMENDMENT I – FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

MASSACHUSETTS GENERAL LAWS, chapter 150E, section 12

The commonwealth or any other employer shall require as a condition of employment during the life of a collective bargaining agreement so providing, the payment on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, of a service fee to the employee organization which in accordance with the provisions of this chapter, is duly recognized by the employer or designated by the commission as the exclusive bargaining agent for the unit in which such employee is employed: provided, however, that such service fee shall not be imposed unless the collective bargaining agreement requiring its payment as a condition of employment has been formally executed, pursuant to a vote of a majority of all employees in such bargaining unit present and voting.

Prior to the vote, the exclusive bargaining agent shall make reasonable efforts to notify all employees in the unit of the time and place of the meeting at which the ratification vote is to be held, or any other method which will be used to conduct the ratification vote. The amount of such service fee shall be equal to the amount required to become a member and remain a member in good standing of the exclusive bargaining agent and its affiliates to or from which membership dues or per capita fees are paid or received. No employee organization shall receive a service fee as provided herein unless it has established a procedure by which any employee so demanding may obtain a rebate of that part of said employee's service payment, if any, that represents a pro rata share of expenditures by the organization or its affiliates for:

(1) contributions to political candidates or political committees formed for a candidate or political party;

(2) publicizing of an organizational preference for a candidate for political office;

(3) efforts to enact, defeat, repeal or amend legislation unrelated to the wages, hours, standard of productivity and performance, and other terms and conditions of employment, and the welfare or the working environment of employees represented by the exclusive bargaining agent or its affiliates;

(4) contributions to charitable, religious or ideological causes not germane to its duties as the exclusive bargaining agent;

(5) benefits which are not germane to the government or duties as bargaining agent, or the exclusive bargaining agent or its affiliates and available only to the members of the employee organization.

It shall be a prohibited labor practice for an employee organization or its affiliates to discriminate against an employee on the basis of the employee's membership, nonmembership or agency fee status in the employee organization or its affiliates.

Supreme Court, U.S.
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(3)

No. 00-1003

IN THE
Supreme Court of the United States

JAMES J. BELHUMEUR, *et al.*,
Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF IN OPPOSITION OF RESPONDENTS MASSACHUSETTS TEACHERS ASSOCIATION, *ET AL.*

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STATUTES

Mass. Gen. Laws ch. 150E, § 12 2

IN THE

Supreme Court of the United States

JAMES J. BELHUMEUR, *et al.*,
Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF IN OPPOSITION OF RESPONDENTS MASSACHUSETTS TEACHERS ASSOCIATION, *ET AL.*

Respondents Massachusetts Teachers Association ("MTA"), *et al.* (hereinafter the "Union respondents"),[1] respectfully urge the Court to deny the Petition for Writ of Certiorari, which raises no unsettled legal issue worthy of this Court's attention.

[1] In addition to MTA, this Brief in Opposition is submitted on behalf of respondents National Education Association ("NEA"), Andover Education Association, Arlington Education Association, Bridgewater Education Association, Chicopee Education Association, Fairhaven Education Association, Faculty-Staff Union, Holyoke Education Association, Massachusetts Society of Professors, New Bedford Education Association, Quabbin Education Association, Springfield Education Association, Tantasqua Education Association, Wareham Education Association, Woburn Education Association, and Education Association of Worcester.

STATEMENT OF THE CASE

Massachusetts, like many other states, allows public-employee unions to negotiate with employers for contract provisions requiring all members of the represented bargaining unit to contribute to the cost of the collective bargaining services the union provides. Mass. Gen. Laws ch. 150E, § 12. Pursuant to such "agency fee" provisions, an employee who elects not to join the union that represents his or her bargaining unit is required to pay a monthly service fee. A nonmember who objects to paying full union dues ("objecting nonmember") can, however—under both the Massachusetts statute and federal constitutional law—be required to pay only a reduced fee equivalent to his or her pro rata share of the union's expenditures related to collective bargaining, grievance adjustment, and other representational functions.

This Court has, as a First Amendment matter, required that unions collecting an agency fee establish procedures through which objecting nonmembers may challenge the union's calculation of their reduced fee and obtain "a reasonably prompt decision by an impartial decisionmaker." *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 (1986). In Massachusetts, the Supreme Judicial Court has construed the state's agency fee statute as "giv[ing] the dissenting employee the option of bringing a prohibited practice complaint before the Labor Relations Commission if the employee wishes to challenge the fee amount." *School Committee v. Greenfield Educ. Ass'n*, 385 Mass. 70, 85, 431 N.E.2d 180, 189 (1982).

The petitioners in this case ("feepayers") are education employees who are members of bargaining units represented by the Union respondents. Between 1987 and 1992 they filed a total of 429 prohibited practice complaints with the Massachusetts Labor Relations Commission ("Commission") challenging the amounts of the reduced agency fees for fiscal years 1987-88 through 1991-92 assessed by MTA and the

other Union respondents. The Commission consolidated all of these charges in the instant proceeding.[2]

Pursuant to an agreement of the parties, MTA's expenditures for the fiscal year 1990-91—which formed the basis for the agency fee it assessed for 1991-92—were to be used as the basis for resolving the charges from all five years. Following extensive discovery, an administrative law judge conducted 53 days of hearings in 1993 and 1994, during which MTA offered 72 exhibits and the feepayers offered 1,048 exhibits. MTA and the feepayers subsequently submitted post-hearing briefs, in June 1995, of 282 and 531 pages, respectively. In March 1996, the administrative law judge issued recommended findings of fact and conclusions of law of more than 200 pages. *See* Appendices to Petition for Writ of Certiorari ("Pet. App.") 100a *et seq*. The judge found that MTA had proved its entitlement, for the test year, to an agency fee of $144.41—a reduction of $26.29 from the fee MTA had claimed. Pet. App. 304a.

Both sides filed challenges to the administrative law judge's recommendations, and the Commission issued its Decision and Order on April 23, 1997. *See* Pet. App. 25a *et seq*. While generally adopting the hearing officer's findings, the Commission made minor changes that resulted in an agency fee of $143.93. Again, both the feepayers and the unions appealed, and the Supreme Judicial Court allowed a direct appeal. Following briefing and argument, the court

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[2] The Commission considered separately and dismissed the portions of these charges challenging the adequacy of the unions' financial disclosure to nonmembers, except as to three local unions, as to which the Commission, in a separate proceeding, ultimately upheld the disclosure challenges. In both instances, the Supreme Judicial Court affirmed and this Court denied certiorari. *See Belhumeur v. Labor Relations Comm'n*, 411 Mass. 142, 580 N.E.2d 746 (1991), *cert. denied*, 503 U.S. 1004 (1992); *Wareham Educ. Ass'n v. Labor Relations Comm'n*, 430 Mass. 81, 713 N.E.2d 363, *cert. denied*, 528 U.S. 1062 (1999).

issued its decision on September 21, 2000. Pet. App. 1a *et seq*. The court affirmed the Commission's decision with three minor modifications (two favoring the unions and one favoring the feepayers), and remanded to the Commission for entry of an appropriate order.

ARGUMENT

The decision of the Massachusetts Supreme Judicial Court raises no issue that warrants review by this Court. The court below relied entirely on well-settled law and, in applying that law to the facts of this case, broke no new ground in any respect. There is no conflict between the decision below and that of any other appellate court with respect to any issue raised by the Petition. Nor is there any basis whatever for petitioners' request that this Court revisit the fundamentals of the law of agency fee.

I. THE PETITION IDENTIFIES NO UNSETTLED QUESTION OF LAW REQUIRING RESOLUTION BY THIS COURT

In their first and second questions presented, petitioners point to several specific respects in which they argue that their First Amendment rights were violated in this case. They are unable, however, to identify any conflict between the holding of the court below and that of any other appellate court with respect to any of these issues. While we think it clear that the decision below was in fact correct in respect to all of the issues raised by the Petition, the more pertinent point is that none of those issues is legally unsettled, and none, therefore, merits this Court's plenary consideration.

A. Petitioners' initial contention is that the Commission proceeding, having stretched on for many years, failed to provide the "reasonably prompt decision by an impartial decisionmaker," on challenges to the amount of the agency

fee, that is required by *Hudson*, 475 U.S. at 307. *See* Petition for Writ of Certiorari ("Pet.") at 18-20. We submit that the Supreme Judicial Court was correct in holding that the length of the proceeding was justified by the particular circumstances of the case. *See* Pet. App. 8a-9a.[3] In any event, petitioners cannot be heard to complain that they were denied the right to a "reasonably prompt" resolution of their agency fee challenges because of the length of the Commission's proceeding, when it was they who chose the Commission as the forum for their challenge to the Union respondents' agency fees.

While feepayers in Massachusetts have "the option of bringing a prohibited practice complaint before the Labor Relations Commission" as a means of challenging the fee amount, *Greenfield*, 385 Mass. at 85, 431 N.E.2d at 189, the availability of that option in no way prevents them from

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[3] Not only was this a test case that resolved hundreds of claims from many years and established the Commission's framework and procedures for resolving agency fee challenges in the future, but the length of the proceeding was also, as the court below pointed out, Pet. App. 3a, 8a-9a, attributable in large part to the actions of petitioners themselves. Thus, after the Commission dismissed the portions of the charges alleging that the unions had provided constitutionally inadequate notice, the feepayers sought a stay of the proceedings pending their appeal of that dismissal. After the Supreme Judicial Court issued its opinion affirming the Commission, the feepayers again (albeit this time unsuccessfully) sought a postponement pending this Court's resolution of their petition for certiorari. Once the Commission's hearing began, the feepayers spared no time and effort to make the case as complex and time-consuming as possible—introducing no less than 1,048 exhibits (compared to 72 offered by MTA) and filing a post-hearing brief of 531 pages. Petitioners (with the concurrence of MTA) twice sought extensions of the briefing schedule on the ground that the record was so voluminous. Under these circumstances, petitioners' complaint that the Commission proceeding took too long has all the appeal of the proverbial boy who murdered his parents and then sought the court's mercy because of his status as an orphan.

instead invoking the rebate procedure established by MTA and its affiliates pursuant to the requirements of *Hudson*, 475 U.S. at 307-08, under which an impartial decisionmaker appointed by the American Arbitration Association ("AAA") determines whether the unions have met their burden of proving the chargeability of the fees they seek. To invoke this arbitration procedure, a nonmember feepayer need only send a letter to the treasurer of the local association that represents him or her; the burden is then on the unions to prove in the arbitration proceedings their entitlement to their fees. Because the AAA arbitration procedure was not invoked here, the record does not disclose how long it would have taken for the feepayers to have obtained a resolution of their agency fee challenges in that way; but AAA arbitration procedures established by other NEA affiliates typically resolve agency fee challenges within a period of months after the challenge is filed, and have accordingly been approved by the courts as meeting *Hudson*'s requirement of a "reasonably prompt" decision. *See, e.g., Grunwald v. San Bernardino City Unified School Dist.*, 994 F.2d 1370, 1377 (9th Cir.), *cert. denied*, 510 U.S. 964 (1993).

Perhaps more to the point, this case raises no unresolved legal issue that requires this Court's attention. Despite their efforts, petitioners have failed to demonstrate that the views of the court below with respect to *Hudson*'s requirement of a "reasonably prompt" decision are in conflict with those of any other appellate court. In their effort to conjure up a circuit split, petitioners cite decisions from the Sixth, Seventh, and Ninth Circuits that they assert to be contrary to the decision of the Supreme Judicial Court. *See* Pet. at 18-19. But those decisions dealt with a different question from the one presented here. Most of them involved facial challenges to the constitutionality of union-established procedures for the resolution of agency fee challenges, and the question presented was whether these procedures complied with *Hudson*'s requirements—including the requirement of a

"reasonably prompt" decision. *See Perry v. Local Lodge 2569*, 708 F.2d 1258, 1262 (7th Cir. 1983) (pre-*Hudson* case); *Damiano v. Matish*, 830 F.2d 1363, 1371-72 (6th Cir. 1987); *Grunwald*, 994 F.2d at 1376-77.[4]

The instant case, on the other hand, involves no facial challenge to union procedures (or any other procedures) for the resolution of agency fee challenges. Rather, petitioners have opted to bring their agency fee challenges through a state agency proceeding, and the question is whether their First Amendment rights were violated because of the length of time that proceeding took. For the reasons stated above we think it clear that the answer to that question is "no," but the critical point is that this is a different question than the one addressed by the cases on which petitioners rely. There is, accordingly, no conflict among the courts that requires this Court's resolution.

B. Petitioners next take issue with the Supreme Judicial Court's rulings with respect to the chargeability of overhead and meeting expenses. Pet. at 20-22. It is settled law that union activities necessary to maintain the union's existence and functioning are chargeable to objecting nonmembers,

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[4] The other federal appellate case cited by petitioners, *Tavernor v. Illinois Federation of Teachers*, 226 F.3d 842 (7th Cir. 2000), is a bit nearer to the mark in that it, like this case, involved a state agency procedure for the resolution of agency fee challenges. But the issue presented in *Tavernor* was not the one petitioners raise here—*i.e.*, whether the mere fact that a challenge procedure takes more than a certain length of time constitutes, without more, a violation of the feepayers' rights under *Hudson*. Rather, the question the court addressed in *Tavernor* was whether, in light of the fact that agency fee challenges took more than a year to resolve under the procedures of the Illinois Education Labor Relations Board, it was unconstitutional for the union to require agency feepayers to pay into escrow, pending resolution of the challenge, 100% of the amount of union dues, including the approximately 15% that the union conceded would not be chargeable to objecting feepayers. *See id.* at 848-51. That is an issue that is not raised by the instant case.

notwithstanding that such activities may to some extent support or be commingled with nonchargeable activities. The leading case is *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), where this Court held that union conventions were fully chargeable:

> Surely if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy. Conventions such as those at issue here ... seem to us to be essential to the union's discharge of its duties as bargaining agent.

Id. at 448-49; *see also id.* at 456-57 (same result under First Amendment analysis). The Court reiterated its position on this point in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 529-30 (1991).

The Supreme Judicial Court followed these holdings. It rejected petitioners' contention that when both chargeable and nonchargeable activities were part of a union meeting or conference, the entire event should presumptively be held nonchargeable, Pet. App. 10a-13a, and it applied the *Ellis/Lehnert* principles in upholding the chargeability of union overhead expenses such as accounting. *Id.* at 14a-16a.[5]

Petitioners rely—as they did below—on dicta in *Schneider v. Colegio de Abogados*, 917 F.2d 620, 633-34 (1st Cir. 1990), *cert. denied*, 502 U.S. 1029 (1992), a bar dues case

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[5] The court agreed with the Commission that "overhead expenditures necessary to maintain the union's organizational existence, such as rent, property insurance, accounting and auditing costs, and the costs of a union convention, are presumed to be fully chargeable unless there is evidence that the expense was incurred in furtherance of an exclusively nonchargeable activity," Pet. App. 14a-15a, noting that such expenses "will be incurred in roughly the same amounts regardless of the amount of the union's nonchargeable expenditures." *Id.* at 16a.

from Puerto Rico, in which the court advanced the hypothetical situation of a bar meeting at which prayers for the health of Fidel Castro and an address by "a prominent Sandanista" would "likely" give such an ideological coloring to the atmosphere that the entire meeting should be held nonchargeable. That is not a fact pattern that bears any resemblance to the issues that were before the Commission in this case, and the First Circuit's dicta certainly do not suggest that there exists any conflict between the holdings of that court and the Supreme Judicial Court that would require this Court's intervention.[6]

C. Petitioners' contention with regard to evidentiary burdens, Pet. at 22-24, not only raises no unsettled legal issue—petitioners do not even claim it does—but rests largely on a misrepresentation of what the Commission did. Petitioners assert that the Commission shifted to them the burden of proof with respect to the chargeability of the union's expenditures, by "[a]llowing the union to prove its political [*i.e.*, nonchargeable] activities . . . instead of its legitimate, chargeable activities . . . ." Pet. at 24.

The evidentiary framework adopted by the Commission, and approved by the court below, for analyzing challenges to the amount of agency fees is fully consistent with this Court's teaching on the subject. In *ALPA v. Miller*, 523 U.S. 866 (1998), this Court made clear that while it was the union's burden to prove the chargeability of its expenditures, that did not mean that feepayers could "file a generally phrased complaint, then sit back and require the union to prove the

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[6] The only other appellate decision cited by petitioners with respect to overhead and meetings is *Beck v. CWA*, 776 F.2d 1187 (4th Cir. 1985), *en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd*, 487 U.S. 735 (1988). Petitioners do no more than list the *Beck* decision in a string citation, without explanation or reference to a particular page, and our perusal of the 38-page opinion has found nothing that could be said to be in conflict with the decision of the Supreme Judicial Court in this case.

'germaneness' of its expenditures without a clue as to 'which of its thousands of expenditures' the objectors oppose." *Id.* at 878. Rather, armed with the notice required by *Hudson*, as well as appropriate discovery, "an objector can be expected to point to the expenditures or classes of expenditures he or she finds questionable." *Id.*

Although its decision predated *Miller*, the Commission adopted a remarkably similar framework. The Commission explained that the union's burden of proof under *Hudson* "does not mean ... that a union must present exhaustive evidence in its case-in-chief about every single union expenditure and every specific union activity during the period for which the fee is claimed." Pet. App. 33a. Rather, the union's initial burden was to present a *prima facie* showing that its chargeability calculations were correct:

> Once a union makes its *prima facie* showing of chargeability, the objecting fee payer assumes a limited *burden of production* to probe the union's evidence and produce some evidence to rebut the union's *prima facie* showing.... However, *at all times, a union retains the ultimate burden of persuasion.*

Pet. App. 34a (emphasis added); *see also* Pet. App. 4a-5a.

Petitioners claim that the unions escaped their burden of proof with respect to the chargeability of staff time, in that the Commission accepted admissions of political activity as sufficient proof that the nonadmitted activities were chargeable. Pet. at 5a-6a, 22a-24a. That assertion, based on the Commission's crediting an affidavit that *inter alia* admitted that certain staff activity records had been miscoded, is simply incorrect. As the Supreme Judicial Court recognized in rejecting this same contention, "the record is clear that the union introduced, and the commission credited, other evidence to support the allocation of staff time." Pet. App. 13a n.12.

Review of the Commission opinions in their entirety abundantly supports that conclusion, and in any event this Court does not sit to review the accuracy of lower-court determinations of the sufficiency of the evidence in particular cases. There is no legal issue here that warrants review by this Court.

D. Finally, petitioners complain that they were denied their First Amendment rights because purchasing the transcript necessary for judicial review cost them $25,000. Leaving aside the novel suggestion that invoking the First Amendment somehow entitles petitioners to cost-free judicial review, petitioners have again simply misrepresented the facts. In response to petitioners' complaint about the expense of the transcript, the Commission's hearing officer offered them two alternatives: (a) the Commission would tape record the hearing, with the tape serving as the official record of the proceeding; or (b) the union would provide a transcript, at its expense, and the feepayers would have access to the Commission's copy of that transcript at the Commission's offices. Tr. IX 1337-1344. The feepayers declined to adopt either of these options, evidently preferring instead to preserve their ability to complain about the "burden" this litigation has placed upon them.

II. THE PETITION'S REQUEST THAT THIS COURT RECONSIDER WELL-SETTLED FUNDAMENTAL PRINCIPLES OF AGENCY FEE LAW HAS NO BASIS IN THE RECORD OF THIS CASE

While, as we have just seen, the first two questions presented advance claims that are entirely unfounded and raise no legal issues requiring resolution by this Court, they at least have the merit of resting on the factual and legal record that is now before the Court. The same cannot be said of the third question presented, in which petitioners invite the Court

to jettison nearly half a century of agency fee jurisprudence—what they label the "*Street* experiment"[7]—because of alleged problems in the way their agency fee challenges were resolved in this case. Pet. at 12-17.

It is one thing to argue that the procedural and substantive requirements this Court has established to protect the First Amendment rights of agency feepayers were not complied with *in this case*. That is what petitioners argue—erroneously, we submit—with respect to their first and second questions presented, and it is an argument that can be resolved by looking to the record of this case. It is an altogether different matter, however, to assert that not only were the agency fee challenge procedures at issue in this case insufficiently protective of feepayers' First Amendment rights, but that "*all* challenge procedures . . . contain such high transaction costs that they of necessity unduly burden Free Speech rights." Pet. at i (emphasis added).

Whether that is true cannot, obviously, be determined from the record in this case alone, and nowhere do petitioners cite *any* evidence that any "challenge procedure[]" other than the one at issue here is inadequate. Their argument, rather, relies solely on the facts of this case. *See, e.g.*, Pet. at 13 ("the reality of what has occurred *in this case*"); *id.* at 16 ("*Here*, the record reveals . . .").

Over the course of the last several decades this Court has—while upholding the constitutionality of the agency fee, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)—elaborated extensive protections for feepayers' First Amendment right to refuse to help support union expenditures for political and ideological purposes unrelated to the union's role as exclusive bargaining representative. Thus, the Court has both limited the types of expenditures for which a union can charge objecting nonmembers, *see, e.g.*,

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[7] *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), and set out procedural safeguards that must be applied by unions seeking to collect agency fees. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *ALPA v. Miller*, 523 U.S. 866 (1998). These decisions, and the dozens of others from the lower federal and state courts that have expanded on them,[8] have established a workable system for "preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237). Petitioners offer no reason for this Court to revisit the fundamental principles established by these cases.

* * *

In short, petitioners' contention that the court below erred in deciding this case presents no certworthy issue; and their attempt to generalize the issues of this case into a broader question about the viability of this Court's agency fee jurisprudence rests on nothing but a well-developed flair for hyperbole.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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[8] The one such case that petitioners cite—*Tavernor*, *supra*—offers them no support. In contrast to the approach advocated by the Petition, the *Tavernor* court responded to what it saw as a problem involving "transaction costs" not by "sound[ing] the alarm," Pet. at 16, but by addressing specifically the narrow problem it identified. *See* 226 F.3d at 847-51 (discussed *supra* note 4).

Respectfully submitted,

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IN THE

Supreme Court of the United States

JAMES J. BELHUMEUR, *et al.*,

Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION;
SPRINGFIELD EDUCATION ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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February 2001

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ARGUMENT

Respondent Massachusetts Labor Relations Commission has not filed a brief in opposition to the Petition for Writ of Certiorari. However, the respondents Springfield Education Association *et al.* ("unions") have filed an opposition. The petitioning employees, James J. Belhumeur *et al.*, ask consideration of their following reply.

I. The Respondents Cannot Paper Over the Conflict Between the Decision of the Court Below That an Eight-Year First-Amendment Procedure Is "Reasonably Prompt" and Circuit Court Decisions That Procedures in Excess of One Year Are Unconstitutionally Long and Burdensome.

A. This procedure is not saved by the fact that it is a creature of the state and operates in an unconstitutional manner.

Respondent unions do not deny that the First-Amendment procedure created by the Commonwealth of Massachusetts took eight (8) years in this case. The unions do not deny that this Court ruled that this procedure must be "reasonably prompt," *Chicago Teachers Union v. Hudson,* 475 U.S. 292, 307 (1986). They do not deny that the Sixth, Seventh and Ninth Circuits, as well as a host of lower federal courts, have ruled *Hudson* procedures which take more than one (1) year are unconstitutionally burdensome. See Petition ("Pet."), pp. 18-19.

Instead, the unions wrongly argue there is no conflict because the procedures passed on by the circuit courts involved "facial challenges to the constitutionality of union-established procedures." Brief in Opposition ("Opp."), p. 6.

Is the constitutionality of a procedure saved because it was created by the Commonwealth of Massachusetts rather than a labor union?

Is the conflict eliminated because some lower courts predicted, as opposed to observed, that the procedure would be unconstitutionally long and burdensome?

These union-promulgated distinctions are frivolous and cannot mask the direct conflict between this decision and those of the cited circuit courts.

The foregoing arguments the unions claim are "more to the point." Opp. at 6. Their "less to the point" arguments are discussed next.

B. The employees are *not* disqualified from raising their free speech rights because they invoked the statutory *Hudson* procedure and vigorously pursued their rights.

The unions argue the petitioning employees cannot complain about the Commonwealth's unconstitutional *Hudson* procedure because they could have invoked the unions' internal *Hudson* procedure. Opp. at 5.[1]

Speculation that another procedure might have been more timely does not save the Commonwealth's burdensome eight (8)-year long procedure. As pointed out in the employees' Petition, the Supreme Judicial Court of Massachusetts originally assigned the obligation to hear agency

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[1] Massachusetts' highest court has twice commented that the unions' *Hudson* procedures were "not only cumbersome but designed to discourage all but the most zealous employee." *Harrison v. MSP/MTA/NEA*, 405 Mass. 56, 65 (1989); *School Comm. v. Greenfield Educ. Ass'n*, 385 Mass. 70, 79 n.4 (1982). The unions have now modified those procedures, but no court has passed on them.

fee challenges to the Labor Relations Commission in 1982. The Commission held it was providing the *Hudson* procedure here and the Supreme Judicial Court agreed. Pet. at 10.

The unions also argue in a footnote (Opp. at 5, n.3) that the employees are responsible for the delay because they introduced 1,048 exhibits to the union's paltry 72 exhibits. The unions fail to mention in this comparison the 8,000 page transcript or the relative number of witnesses. The unions put forth 23 witnesses versus 2 witnesses for the employees. The trial pitted the credibility of contemporary union documents against testimony about what self-serving union witnesses recalled doing three years prior.

Notably, the unions do not suggest the employees are responsible for anything close to seven (7) years of delay. Seven (7) years represents the gulf between what the court below approved and what the circuit courts allow.

The unions point out (Opp. at 5, n.3) that this case resolved "hundreds of claims from many years." The employees could have demanded proof for each year and each level of the union. Instead, in their earnest desire to obtain a prompt but fair hearing, they agreed to streamline the litigation by reducing it to one representative year which would not only resolve the fee claims of the Massachusetts Teachers Association, but also the claims of the largest and most complex union, the National Education Association. Appendix ("App.") 26a.

II. The Proper Allocation of Overhead and Meeting Expenses Is Far from Settled.

The unions argue that this Court's decision in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984) "settles" the issues of

allocating overhead and meeting expenses. Opp. at 7-8. The truth is that both sides claim *Ellis* because it does not directly address the issue of union overhead (such as accounting) expenses or the issue of co-mingled meeting expenses.

Only through analogy can these expenses be addressed. *Ellis* ruled on convention expenses and union newspaper expenses. 466 U.S. at 448-51. The unions argue that overhead and meeting expenses are like convention expenses (completely chargeable), while the employees argue they are more akin to union newspaper expenses (partially chargeable).

The matter is so far from settled that this Court's later opinion, *Lehnert v. Ferris Faculty Association,* 500 U.S. 507 (1991), questioned the 100% chargeability of convention expenses–the foundation of the unions' argument. The Court stated, "We need not determine whether petitioners could be commanded to support all the expenses of these conventions." *Id.* at 530. This is not the language used for a "settled" rule.[2]

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[2] The unions point out (Opp. at 9, n.6) an omission in the employees' citation to *Beck v. Communications Workers*, 776 F.2d 1187 (4th Cir. 1985), *aff'd en banc*, 800 F.2d 1280 (1986), *aff'd*, 487 U.S. 735 (1988). The employees omitted the citation to the page of the Circuit Court's decision which dealt with overhead expenses. On pages 1211-12, the Fourth Circuit said "'administrative [expenses]' was a catch-all, spread out over the other seven classifications on a proportionate basis, and appears to create no problems."

III. Vague Generalities Will Not Erase the Commission's Plain Statements About How It Applied the Burden of Proof.

The Labor Relations Commission described its decision making this way:

> After the MTA met its *prima facie* burden, the Charging Parties met their production burden by calling into question aspects of the Union's *prima facie* case. The Charging Parties challenged the reliability of the MTA's time keeping system and provided examples of activity the MTA considered chargeable to non-members that the Charging Parties argued the MTA spent on political events. In response, the MTA's witnesses acknowledged documentary evidence that it had misallocated some time to the incorrect account.

(App. 38a-39a) (footnotes omitted)

Later, the Commission continued:

> The field staff's political activity was isolated and enumerated by Janet Strecker, whose affidavit forms a basis for the adjustments for misallocated nonchargeable time undertaken in the [Hearing Officer's] Recommended Decision. We find that, on this record, the MTA met its burden of persuasion that its political time and activities can be isolated and segregated. *We are persuaded that Strecker's testimony, including the charts contained in her affidavit, contained a reasonable, good faith ledger of the Affiliate Service staffs' primary political activities.*

(App. 46a-47a) (emphasis added)

To undercut this unambiguous statement regarding how the Commission handled the burden of proof, the unions cite the Supreme Judicial Court which said: "the record is clear that the union introduced, and the commission credited, other evidence to support the allocation of staff time." App. 13a, n.12.

What the Commission did in allocating the burden of proof is plain. The Supreme Judicial Court's vague and generalized statement about unidentified "other evidence" cannot wipe away the Commission's clear explication of what it did.

It is generally true, as the unions assert (Opp. at 11), that this Court does not sit to review most factual disputes. However, in this case the procedure used for fact-finding drew the line on free speech rights. In this situation the Court has both the opportunity and the duty to review the factual determinations made below. *Hurley v. Irish-American Gay Group*, 515 U.S. 557, 567 (1995); *Bose v. Consumers Union*, 466 U.S. 485, 499, 508, n.27 (1984).

More importantly, the Commission's handling of this case, including the application of the burden of proof, demonstrates the truth of the employees' assertion that the time has come to end the *Street* experiment. That is discussed next.

IV. The Record in This Case Proves Justice Black's Prediction That the *Street* Experiment Unconstitutionally Burdens Employee Speech.

The unions argue the record in this case does not prove Justice Black's prediction. In *IAM v. Street*, 367 U.S. 740, 795-96 (1961) (Black, dissenting), Justice Black predicted that the *Street* remedy would create such high transaction

costs that, of necessity, it would unduly burden free speech rights. The record in this case–a 53-day hearing and 8,000 pages of transcript[3]–squarely proves his prediction.

Further proof is not far off. Only three union fee challenge cases have previously come before this Court with some record of how the union spent its money. Those three cases are: *Lehnert v. Ferris Faculty Association,* 500 U.S. 507 (1991); *Communications Workers v. Beck,* 487 U.S. 735 (1988) and *Ellis v. Railway Clerks,* 466 U.S. 435 (1984).

The circuit court decision in *Beck* described the nature of the trial proceedings as "six years of litigation, 4,000 pages of testimony, the introduction of over 3,000 documents, and innumerable hearings." *Beck v. Communications Workers,* 776 F.2d 1187, 1194 (4th Cir. 1985).

The district court in *Lehnert* noted that the case was filed in 1978, but was not tried until eight years later in 1986. Although it involved a relatively "modest" 12 trial days, 12 witnesses and 90 exhibits, *Lehnert v. Ferris Faculty Association,* 643 F. Supp. 1306, 1308 (W.D. Mich. 1986), the record was *not* complete. The trial judge referred to the "paucity of relevant evidence" and found that only 3.4% of the state affiliate's fees was chargeable. *Id.* at 1328-29. The judge referred to "sparse relevant testimony" with regard to the national affiliate of the union and found only 2.75% of its activities chargeable. *Id.* at 1330.

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[3] The unions argue (Opp. at 11) that the employees cannot use the $25,000 transcript fee as an illustration of the undue burden on them. Why? Because the testimony could have been taped and the employees instead could have listened to all 8,000 pages to find references for their briefs!

If it took 12 trial days to prove 2-3% of union fees, imagine how long it would take to present enough relevant evidence to prove 66%–the fee found appropriate in the instant case. The 53-day trial in the instant case pales in comparison.

Although the length of the *Ellis* trial on damages is not revealed, the case was filed in 1973, tried in 1978 and decided by the circuit court in 1982. *Ellis v. Railway Clerks*, 685 F.2d 1065, 1067-68 (9th Cir. 1982).

The difficulty of these cases is not something about which this Court needs to be convinced. In the recent case of *Board of Regents v. Southworth,* 529 U.S. 217, 232 (2000), this Court admitted its difficulty in arriving at chargeable expenses in *Lehnert* and frankly acknowledged the ordeal in "defin[ing] germane speech [expenses chargeable to objectors] with ease or precision."

There is now no doubt that Justice Black was right in condemning the *Street* "challenge" remedy. The question is simply whether this Court will continue to allow non-members who stand up for their free speech rights to continue to be frustrated, burdened and harassed by the high transaction costs of the *Street* remedy.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted, and the case set for plenary briefing and argument on the important questions presented herein on the most recent application of the *Street* experiment.

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